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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE CHRONICLE PUBLISHING COMPANY
and DANNIE MARTIN,
Petitioners,

v.

R.H. RISON, Warden for the United States
Penitentiary at Lompoc, California, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an action brought by a daily newspaper and a federal prisoner challenging the validity under the First Amendment of Federal Bureau of Prisons regulations of nationwide application is rendered non-justiciable by Article III's limitation of the federal judicial power to "Cases" and "Controversies" when, after trial and full briefing and argument in the Court of Appeals, the Bureau releases the prisoner on parole.

2. Whether a federal prisoner's release on parole requires that an appeal in his federal lawsuit challenging prison regulations be dismissed as moot.

3. Whether a federal action raising constitutional challenges to regulations may be dismissed in its entirety as moot notwithstanding the outstanding damage claims of the plaintiffs or the courts' ability to give other effectual relief to at least one party.

LIST OF PARTIES PURSUANT TO RULE 14.1(b)

Pursuant to this Court's Rule 14.1(b), petitioners state that the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were as follows.

Plaintiffs and appellants: The Chronicle Publishing Company[1] and Dannie Martin.

Defendants and appellees: R. H. Rison, Warden of the United States Penitentiary at Lompoc, California; Tom Curd, Assistant Warden; Paul Hofer, Executive Assistant to the Warden; Jerry Williford, Director, Western Region, Federal Bureau of Prisons; Michael Quinlan, Director, Federal Bureau of Prisons; and the Federal Bureau of Prisons.

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[1] Pursuant to this Court's Rule 29.1, petitioners state that San Francisco Newspaper Printing Company, Inc. and Skouras Pictures, Inc. are subsidiaries of petitioner The Chronicle Publishing Company, which has no parent company.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Chronicle Publishing Co.* v. *Rison*, 962 F.2d 959 (9th Cir. 1992). The decision of the United States District Court for the Northern District of California is reported as *Martin* v. *Rison*, 741 F. Supp. 1406 (N.D. Cal. 1990).

JURISDICTION

The decision of the Court of Appeals was filed on April 28, 1992. Petitions for rehearing and a suggestion of rehearing en banc were timely filed. The Court of Appeals denied rehearing on September 21, 1992, Judge D. W. Nelson having voted for rehearing. This timely petition invokes the Court's certiorari jurisdiction under Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This petition raises a question of interpretation of Article III, Section 2 of the United States Constitution. On the merits, this action involved the validity of regulations of the Federal Bureau of Prisons—Section 540.20(b) and, with respect to certain applications, Sections 540.14(d)(4), 540.45 and 541.13 (Prohibited Act 408) of Title 28 of the Code of Federal Regulations—under the free speech and press clauses of the First Amendment to the United States Constitution and the due process clause of the Fifth Amendment to the United States Constitution. The relevant constitutional provisions and regulations are reproduced in the Appendix at 43-45.

STATEMENT OF THE CASE

A. The Public Importance of the Underlying Controversy

In 1986, petitioner Dannie M. Martin, who was incarcerated in the United States Penitentiary at Lompoc, California, after a bank robbery conviction, submitted to the *San Francisco Chronicle*, a daily newspaper published by petitioner The Chronicle Publishing Company ("Chronicle"), a first-person commentary about the impact of acquired immune deficiency syndrome (AIDS) in prison. Believing that the article provided a unique perspective on AIDS, a topic of great public concern, Chronicle published the article on August 3, 1986, under the title *AIDS: The View From a Prison Cell*. Chronicle included a byline identifying Martin and, at the bottom, an identification line stating that Martin was a convict incarcerated at Lompoc.

Over the next twenty-two months, Martin submitted more first-person commentaries to Chronicle, which published seventeen of them in its "Sunday Punch" features section with Martin's byline and identification. Chronicle made its customary payment for published freelance writing, intending it to serve as a token of the writing's value and to encourage future submissions.

Martin's writing quickly earned him a loyal following among Chronicle's readers and attracted the attention of other media. His third Sunday Punch article, which Chronicle entitled *Requiem for Mr. Squirrel* and published on October 26, 1986, told of prison officials' poisoning of squirrels that convicts had befriended, and it prompted world-wide interest. The reaction was reported in a lengthy profile of Martin by *Los Angeles Times* writer Miles Corwin, which Chronicle reprinted in Sunday Punch under the title *Storyteller Laureate of Lompoc Prison*, along with a commentary by Martin, on April 19, 1987.

Martin's thirteenth bylined Sunday Punch commentary, published on November 29, 1987, had an even greater impact. Entitled by Chronicle *The 23-Year-Old 'Career Criminal,'* the article told the story of Lompoc inmate Kevin Sherbondy, sentenced under a revised federal "career criminal" statute to fifteen years in prison without parole for owning a firearm that he believed to be inoperable. The article resulted in an outpouring of support for Sherbondy, including inquiries to the Justice Department from members of Congress. Respondent R. H. Rison, the Lompoc warden, sent reply letters to *Chronicle* readers who had written to President Reagan about Sherbondy's case.[2] With new counsel—hired with money raised by *Chronicle* readers—Sherbondy won his release from prison shortly thereafter, *see United States* v. *Sherbondy*, 865 F.2d 996, 1011 (9th Cir. 1988), and he testified at the trial of this case.

Martin's eighteenth bylined Sunday Punch commentary resulted in solitary confinement and transfer to a prison in a different state. The article, entitled by Chronicle *The Gulag Mentality* and published on June 19, 1988, criticized Warden Rison and his predecessor for certain changes they had made at the prison. Martin implied that Rison's actions had increased tension among prisoners and caused violence. When Rison received a copy of the article in the mail on June 21, 1988, he placed Martin in solitary confinement. After a spate of media inquiries, Rison released Martin from "the hole" two days later. On June 30, 1988, prison officials seized Martin in the Lompoc yard and moved him

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[2] This was reported in a May 23, 1988 *Chronicle* article by Martin, entitled *Letters of Support Get Reply From Warden*. The article, published in the main news section as a sidebar to a larger article about the Sherbondy matter, contained Martin's byline and an identification line stating that he was a convict at Lompoc and a frequent contributor to Sunday Punch.

to a federal prison facility in San Diego, from which he was moved to the Federal Correctional Institution at Phoenix.

Respondent Tom Curd, the assistant warden at Lompoc, issued a news release as "acting warden," stating that Martin's becoming a "compensated byline journalist" for Chronicle was in violation of Section 540.20(b) of Title 28 of the Code of Federal Regulations; that there was evidence that Martin would continue to publish in violation of prison policy; and that Martin had been transferred "pending the outcome of a full investigation into policy violations." Prison officials informed Martin that he had committed Prohibited Act 408, "Conducting a business." 28 C.F.R. § 541.13; *see id.* § 540.14(d)(4) (prohibition to "direct a business"); *id.* § 540.45 (prohibition to "engage actively in a business or profession").

B. The Substantial Expenditure of Judicial and Other Resources in the Trial Court

On July 6, 1988, petitioners Martin and Chronicle filed this action in the district court, naming as defendants Warden Rison and other federal prison officials. An amended complaint added respondent Federal Bureau of Prisons ("BOP") as a defendant and Nancy Hoffman, a *Chronicle* reader, as a plaintiff.[3]

In their complaint, petitioners alleged that Section 540.20(b) violated the First Amendment "on its face and as applied and is unconstitutionally vague." First Amended Complaint ¶ 26,

[3] The district court subsequently dismissed Ms. Hoffman's claims. She did not appeal.

Appendix at 52.[4] Petitioners sought declaratory, injunctive and monetary relief, including a permanent injunction prohibiting respondents from enforcing Section 540.20(b) against Chronicle, Martin or anyone else, First Amended Complaint at 12:8-16, Appendix at 54, and "[c]ompensatory and punitive damages under the *Bivens* doctrine . . . for defendants' constitutional torts." First Amended Complaint at 13:20-23, Appendix at 55.

At petitioners' request, the district court on July 14, 1988, issued a temporary restraining order that, among other things, prohibited respondents from retaliating against Martin or Chronicle for the writing or publication of Martin's articles. On November 10, 1988, after limited discovery, the district court denied cross-motions for summary judgment and granted petitioners' motion for a preliminary injunction. The court issued a written injunction on March 7, 1989, forbidding respondents to enforce the publication restrictions[5] against Martin pending the outcome of this action. Under the district court's protection, by the time trial began in late autumn of 1989, Chronicle had published about a dozen commentaries in Sunday Punch with Martin's byline and the information that he was incarcerated in the Federal Correctional Institution at Phoenix.

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[4] The issue of whether the prohibitions to conduct or direct a business, as applied to freelance writing, violated the First Amendment or were unconstitutionally vague was litigated at trial, decided by the district court, and briefed by all parties to the Court of Appeals. *See* 741 F. Supp. at 1410 & n.4, 1418, Appendix at 7 & n.4, 23-24. Martin claimed violation of his Fifth Amendment due process rights. First Amended Complaint ¶ 27, Appendix at 52. He also raised Fourth Amendment and Sixth Amendment claims. First Amended Complaint ¶¶ 27, 29, Appendix at 52, 53.

[5] The term "publication restrictions" is used herein to refer to Section 540.20(b) and, insofar as they are applied to freelance writing, the prohibitions to conduct, direct or engage actively in a business.

The parties spent much time and money on discovery. In addition to interrogatories, requests for admissions and document production demands, the parties took dozens of depositions, some of which were spread over several days. Former baseball star Denny McLain, who won the Cy Young and American League Most Valuable Player awards in 1968 by posting 31 victories for the world champion Detroit Tigers, testified by deposition about articles he had published while incarcerated in federal prison. Former seven-term U.S. Representative George Hansen gave similar testimony. Christopher John Boyce, whose experiences were the basis for the book and film *The Falcon and the Snowman*, gave deposition testimony from prison regarding his published writing. Edward R. Jones, author of *Hacksaw*, and Dennis Lehman, author of *The Getbacks of Mother Superior*, both testified from prison about their publications while incarcerated. Several others gave similar deposition testimony.

Respondents expended considerable government resources in defense of this action.[6] For example, Clair Cripe, then general counsel to the BOP, came to San Francisco both for a deposition and to testify at trial. Rison, the Lompoc warden, gave multiple-day deposition testimony and trial testimony. Numerous other BOP officials testified, in most cases both by deposition and live at trial. Respondents brought in former BOP Director Norman Carlson to testify as an expert witness at trial. Several other expert witnesses, from points near and far, were called by both sides.

In a pretrial order, the district court determined that the trial would be bifurcated: First, there would be a court trial on petitioners' claims for declaratory and injunctive relief; then, if constitutional violations were found, petitioners' claims for damages

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[6] After prevailing in the district court, respondents filed a cost bill for over $11,000.

would be the subject of a jury trial. The court trial lasted several weeks. Martin was brought to San Francisco from the Phoenix prison for the trial, and federal marshals were with him in court at all times. The parties filed three lengthy post-trial briefs. After closing arguments on February 8, 1990, the district court took several months to render a decision. On June 26, 1990, the district court entered judgment for respondents, accompanied by a fifty-two-page opinion. Since the court found no constitutional violations, the second phase of the trial never was conducted.

C. The Significant Efforts Expended on Appeal and the Frustration of Those Efforts by the Ninth Circuit's Ruling

Chronicle filed a notice of appeal on July 23, 1990. Martin's appeal followed on August 6, 1990. Martin asked the district court for leave to proceed *in forma pauperis*, which was granted over respondents' opposition, the district court stating that the appeal "presents substantial questions."

The Court of Appeals received six briefs on the merits, including an *amicus* brief on behalf of the Society of Professional Journalists, the American Society of Newspaper Editors, the Associated Press, and several other prominent news organizations and journalism societies.[7] These *amici* underscored the national

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[7] The Society of Professional Journalists and several other prestigious organizations have presented awards to Martin and Sunday Punch editor Peter Y. Sussman in recognition of both the informational value of their *Chronicle* pieces and their effort to vindicate important First Amendment rights of publishers and readers in this action. Other examples of public interest in this case include a unanimous June 1989 resolution of the San Francisco County Board of Supervisors that recited some of Martin's and Sussman's accomplishments; described this litigation, including the preliminary injunction then in effect; and urged the BOP to recognize what the lawmakers asserted was the First

importance of the issues presented. Briefing was complete by April 1, 1991. The Court of Appeals heard oral argument on August 23, 1991.[8]

After argument but before the Ninth Circuit decided the appeal, on February 20, 1992, the BOP released Martin on parole. He remains in the custody of the Attorney General and still is subject to broad restrictions concerning his behavior and economic activity. His Certificate of Parole is set forth in the Appendix at 57-62. It imposes a number of conditions on him until the year 2013 and provides that he may be re-incarcerated for a variety of reasons, including violation of a number of broad conditions. In addition, Martin is required each month to submit a completed report form and is subject to revocation of parole for giving a false answer to any of the form's questions about such matters as his work, his income earned, and money received other than from employment. *See* 18 U.S.C. § 1001.

The publication restrictions have not been changed, and Chronicle remains subject to their limitations. Sunday Punch editor Peter Sussman, who often publishes freelance writers' work in Sunday Punch, regularly receives submissions from convicts and is interested in publishing those which, like Martin's published pieces, offer readers insight into a world that most of them know little about despite the fact that it is maintained with their tax dollars. As Sussman stated in a declaration opposing dismissal on mootness grounds, Appendix at 63-64, the publication restrictions inhibit Chronicle's publishing convicts' submissions. For example,

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Amendment right of all federal prisoners to write articles for publication in news media. (The resolution was offered as Exhibit 69 at trial but was not admitted. *See* 741 F. Supp. at 1409 n.1, Appendix at 4 n.1.)

[8] By a two-to-one vote of the Court of Appeals panel, broadcast media requests to record the argument were denied on August 20, 1991.

Sussman must depart from his usual practice of placing bylines on first-person commentary or must subject the author to punishment for violating the prohibition to "publish under a byline." It is not clear to Sussman what he can publish without subjecting the author to punishment for violating the prohibition to "act as reporter." Even if Chronicle publishes a convict's submission, it cannot give the author its customary compensation to encourage future submissions.

A letter sent by respondent Quinlan, Director of the BOP, to Chronicle's publisher during the pendency of the appeal gives Sussman and his Chronicle colleagues even more reason to hesitate to publish convicts' submissions. The March 15, 1991 letter, Appendix at 66-68, suggests that Chronicle violates the publication restrictions when it publishes anything written by a convict, even without a byline and without payment. Quinlan's letter particularly discourages publication in the main news section of the *Chronicle*, stating that it is of even "greater concern" than publication in Sunday Punch.

After releasing Martin to a halfway house and again after his parole, respondents raised the issue of mootness. The parties filed seven briefs in the Court of Appeals on this subject, some accompanied by declarations.

On April 28, 1992, the Ninth Circuit, *per curiam*, issued a published decision stating, in its entirety:

> Because of appellant Martin's release on parole, we find that the entire case is now moot. The judgment of the district court, reported at 741 F. Supp. 1406 (N.D. Cal. 1990), is VACATED and this matter REMANDED with directions to dismiss on the ground of mootness.

962 F.2d at 960, Appendix at 1.

On September 21, 1992, the Ninth Circuit denied rehearing, one judge dissenting, and rejected petitioners' suggestion of rehearing en banc. Appendix at 41-42. This petition follows.

D. Statement of Basis for Federal Jurisdiction Pursuant to Rule 14.1(i)

Petitioners invoked the district court's jurisdiction under Sections 1331, 1361, 2201, and 2241 of Title 28 of the United States Code, Section 702 of Title 5 of the United States Code, and the federal constitutional provisions cited in the complaint. 741 F. Supp. at 1408, Appendix at 3. The jurisdiction of the Court of Appeals to review a judgment of the district court was invoked under Section 1291 of Title 28.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Certiorari Should be Granted to Consider the Circumstances, If Any, in Which Article III Mandates That an Appeal Under Submission Must Be Dismissed as Moot.

A. The Unclear State of Mootness Jurisprudence

This case gives the Court an opportunity to consider whether—and, if so, to what extent—Article III's limitation of the federal judicial power to "Cases" and "Controversies" prohibits federal courts from deciding moot cases.[9] To the extent that

[9] By no means do petitioners concede that this case is moot. For the reasons explained *infra* Parts II and III, it is not; this is reason enough to grant certiorari and reverse the judgment of the Court of Appeals, especially in view of the considerable public interest in this case and the enormous waste of judicial,

mootness determinations are guided by prudential considerations, the Court has an opportunity to articulate the factors that should guide a court of appeals, or a district court, in deciding whether to dismiss a fully submitted case as moot.

The Court's pronouncements on the subject to date have been sparse and somewhat contradictory. On several occasions, the Court has refused to terminate litigation in which the plaintiffs' claims for relief have evaporated, recognizing that "the strict, formalistic view of Article III jurisprudence" is "riddled with exceptions" motivated by "practicalities and prudential considerations." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 406 n.11 (1980). Chief Justice Rehnquist has questioned the Article III basis for mootness doctrine. *Honig* v. *Doe*, 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J., concurring). On other occasions, the Court has implied that Article III prohibits federal courts from deciding moot cases. *E.g.*, *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986). This Term, for example, the Court referred in passing to a "settled" principle "that a federal court has no authority 'to give opinions upon moot questions.'" *Church of Scientology* v. *United States*, 61 U.S.L.W. 4003, 4004 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)).[10]

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governmental and private resources that will result if the case is not decided on the merits. The discussion in Part I, however, assumes *arguendo* that neither petitioners' damage claims nor the continuing injury inflicted on Chronicle by the publication restrictions saves this action from mootness.

[10] In *Church of Scientology*, *Mills* and some other cases with similar statements, the Court gave no explanation for the stated lack of jurisdiction over moot cases. So far as petitioners are aware, the Court has never suggested that any constitutional or statutory provisions other than Article III deprive federal courts of power to decide moot cases.

Neither the plain language nor the history of Article III compels the conclusion that an action in the posture of the instant one is not a "case" or "controversy." *See* Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 636-43 (1992). Indeed, it seems that the notion of an Article III basis for mootness dismissals entered the Court's jurisprudence casually, without examination. *Id.* at 611-12 (noting that Article III was not mentioned in connection with mootness until 1964, in a footnote in the Court's opinion in *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964), in which the Court refused to find mootness).

Moreover, the Court often has held that Article III jurisdiction exists despite major changes in the status of the party seeking judicial relief,[11] alteration or abandonment of the policy whose legality is at issue,[12] or termination of the event that gave rise to the dispute.[13] To say, for example, that where an issue is

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[11] *E.g.*, *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (challenge to abortion law not moot despite fact that plaintiff no longer pregnant); *Geraghty*, 445 U.S. 388 (prisoner challenge to parole release guidelines not moot despite named plaintiff's release on parole).

[12] *E.g.*, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982) (case not moot despite repeal of city ordinance at issue); *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (Clayton Act case not moot despite resignation of interlocking director).

[13] *E.g.*, *Press-Enterprise*, 478 U.S. at 6; *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-03 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-47 (1976). In all these cases, the proceeding at issue had been completed, and the order challenged by the press had expired. Because, however, the issue could come up again at any time, and there might be inadequate time for full judicial review, the Court refused to hold the cases moot.

"capable of repetition, yet evading review," the litigation may "continue notwithstanding the named plaintiff's current lack of a personal stake," *Geraghty*, 445 U.S. at 398, is to acknowledge that Article III does not mandate dismissal for mootness.[14] Rather, it is apparent that "practicalities and prudential considerations" often govern. 445 U.S. at 406 n.11.

Petitioners do not suggest that federal courts should have unbridled discretion to decide the merits of moot cases. The Court should articulate guidelines to govern the exercise of jurisdiction. Some meritorious guidelines are proposed by Professor Lee, who opines that, when a federal court is confronted with a suggestion of mootness,

> the main inquiry should be whether the likely preclusive effect of a judgment or the likely precedential effect of a decision on appeal would justify the expenditure of judicial resources necessary to adjudicate the merits.

Lee, *supra* p. 12, 105 Harv. L. Rev. at 656.

A related question—an important one in this case—is whether the changed circumstances would so seriously affect the reliability or precedential effect of a final decision on the merits as to justify the *waste* of judicial resources (and other resources) that would result from a refusal to adjudicate the merits. As the Chief Justice has stated, the time spent preparing to decide a case by reading briefs, hearing oral argument and conferring is squandered when, after the decisional process is underway, a court is prevented

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[14] Petitioners recognize that the Court has sometimes characterized cases that present no live controversy but that are "capable of repetition, yet evading review" as "not moot." *E.g.*, *Richmond Newspapers*, 448 U.S. at 563. Petitioners submit that such cases are more accurately described as "lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review." *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring).

from reaching the issues. *Honig*, 484 U.S. at 332 (Rehnquist, C.J., concurring).[15]

The manner in which this Court has analyzed the power to decide supplemental state law claims even after dismissal or resolution of the anchoring federal claim provides a useful analogy. In such situations, jurisdiction over the remaining state law claims is to be decided with "flexibility," considering "the values of judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 350 (1988).

In *Rosado* v. *Wyman*, 397 U.S. 397, 403-04 (1970), for example, this Court reviewed a lower court's decision to decide a pendent claim after the anchoring federal claim had become moot. This Court affirmed and emphasized that the lower court had held hearings on the matter before the mooting event occurred and that the question to be decided involved a matter of federal policy. The Court stated:

> We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

Id. at 405.

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[15] The Chief Justice, noting this Court's "unique" resources and ability to bind all other courts, confined his advocacy of a change in mootness doctrine to cases that become moot after this Court has undertaken consideration of them. *Honig*, 484 U.S. at 332 (Rehnquist, C.J., concurring). Petitioners submit that the resources of other federal courts also are worthy of conservation. *See* Lee, *supra* p. 12, 105 Harv. L. Rev. at 656 n.285.

The lower courts have, when appropriate, affirmed the retention of jurisdiction in such cases. Such a resolution is particularly justified if the case is approaching trial and a good deal of judicial time and effort has been invested in it. *Schneider* v. *TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991); *see also Newport Ltd.* v. *Sears, Roebuck & Co.*, 941 F.2d 302, 307-08 (5th Cir. 1991) (abuse of discretion to dismiss supplemental claims where "hundreds of Court hours" devoted to case and litigation had reached "the eve of trial after years of difficult discovery"), *cert. denied*, 117 L. Ed. 2d 420 (1992). The same "values of judicial economy, convenience, [and] fairness" that must be considered in deciding whether to dismiss supplemental claims should be considered in deciding whether to dismiss an action as moot.

Petitioners do not suggest that every case in which *some* judicial resources have been expended ought to continue in spite of mootness. The mootness doctrine should, however, be flexible enough that, if an action has reached an advanced stage and the parties and courts have expended considerable resources on it, those facts are considered in determining whether the case will be decided on its merits.

B. The Compelling Reasons for This Case to Be Decided on the Merits

The Ninth Circuit did not explicitly rely on Article III, or any other authority, for its determination that this entire case is moot and must be dismissed. Nothing less than constitutional compulsion, however, could justify the action taken by the Court of Appeals. All conceivable "practicalities and prudential considerations" militate in favor of resolution of the legal issues. Petitioners submit, in particular, the following:

1. The trial consumed several weeks, involving as it did lay and expert witnesses from around the country. The district judge wrote and published a lengthy opinion. 741 F. Supp. 1406, Appendix at 2-40. The appeal was fully briefed, including an amicus brief. The appeal was orally argued and submitted to the Court of Appeals. Only then did the BOP release petitioner Martin and claim mootness. A dismissal based on mootness results in a pointless waste of judicial resources.

2. The controversy in this case is not an isolated dispute affecting individuals but a challenge to federal regulations of nationwide and continuing application. The publication restrictions are alleged to violate the First Amendment guarantees of freedom of speech and of the press. They are attacked not merely as applied to petitioner Martin but on their face. The regulations remain in full force and effect, with the BOP standing ready to enforce them against any prisoner who attempts freelance newspaper writing. If any prisoner should dare to write in violation of the regulations, and he happens to be serving a relatively short sentence, his case will evade judicial review.[16] The

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[16] The likelihood that a certain type of case will evade review is relevant to whether an otherwise moot example of that type of case should be decided on its merits; however, it is not (and should not be) necessary to demonstrate that *every* such case will *inevitably* evade review. Even those Justices least inclined to decide the merits of moot cases agree that the "yet evading review" factor "is prudential; whether or not that criterion is met, a justiciable controversy exists." *Honig*, 484 U.S. at 341 (Scalia, J., dissenting). Accordingly, the evasiveness of the type of litigation at issue should be regarded as one factor in deciding whether to dismiss a particular case.

constitutionality of the publication restrictions is an important question that ought not to go unsettled.[17]

3. Petitioner Chronicle remains vitally interested in the constitutionality of the regulations, which continue to inhibit its exercise of editorial judgment. *See* Appendix at 63-64 (Peter Sussman's declaration). This ensures (even if petitioner Martin had somehow lost any interest in the case, which he has not) that a concrete, adversarial resolution of the legal issues will be achieved. The fact pattern of this case indisputably is "capable of repetition" as between respondents and Chronicle, which publishes a daily newspaper, routinely publishes articles by freelance authors, and maintains an interest in reporting about prisons.[18] Indeed, while the appeal was pending in the Ninth Circuit, respondent Quinlan, Director of the BOP, wrote to Chronicle's publisher to lecture him on his responsibilities under the district court decision. Appendix at 65-68.[19]

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[17] The importance of the issues is illustrated by the Court's recent invalidation, on First Amendment grounds, of a state statute requiring profits derived by criminals from exploitation of their crimes to be deposited in escrow to satisfy victims' claims. *Simon & Schuster* v. *Members of the N.Y. State Crime Victims Bd.*, 116 L. Ed. 2d 476 (1991). The district court in the instant case cited the existence of "Son of Sam" statutes, such as the one invalidated in *Simon & Schuster*, in support of the constitutionality of the publication restrictions. 741 F. Supp. at 1416, Appendix at 18.

[18] The question is whether the controversy is "capable" of repetition, not whether the plaintiff has "demonstrated that a recurrence of the dispute [is] more probable than not." *Honig*, 484 U.S. at 319 n.6.

[19] The issue also is capable of repetition as to Martin. He remains in the custody of the Attorney General and is subject to being returned to prison at any time before the year 2013. *See* cases cited *infra* Part II.

In short, this is the *kind* of case that should not be dismissed as moot. As Professor Lee explains, in determining whether a case "offers sufficient precedential promise" to justify a final decision on the merits despite mootness, the Court should ask questions such as:

> Are the facts concrete or still evolving? Are they typical or atypical of disputes likely to arise among others? Is counsel sophisticated enough to help the court develop "cutting edge" law? Do the parties have sufficient motivation or incentives to spur them into making the fullest presentations on behalf of their respective positions?

Lee, *supra* p. 12, 105 Harv. L. Rev. at 656-57 (footnotes omitted). The answers in this case all point to reversal of the Ninth Circuit's holding of mootness. The Court should grant certiorari to clarify that Article III does not mandate the decision below and the consequent waste of judicial resources.

II. Certiorari Should Be Granted Because the Decision Below Conflicts With the Decisions of Other Circuits.

The Ninth Circuit's decision that petitioner Martin's release on parole requires dismissal of the appeal as moot conflicts with the decisions of at least two other circuits, the Tenth and the Seventh. *See McKinney* v. *Maynard*, 952 F.2d 350, 351 (10th Cir. 1991) (neither damage nor injunctive relief claims moot); *Chapman* v. *Pickett*, 586 F.2d 22, 26 (7th Cir. 1978) (defendants immune from damage claims, but injunctive and declaratory relief claims not moot); *Morales* v. *Schmidt*, 489 F.2d 1335, 1336 (7th Cir. 1973) (injunctive relief claim not moot); *see also Chiles* v. *Thornburgh*, 865 F.2d 1197, 1203 (11th Cir. 1989) (challenge to

use of detention facility not moot because "it is quite possible" that officials might decide to place felons in it).[20]

The circuits, thus, are in conflict over this important and recurring mootness issue. Certainly, this case frames the issue in concrete terms: Martin challenges regulations with continuing and widespread impact; the terms of his release impose conditions that permit re-incarceration for a variety of reasons; and the mootness decision here was made as the case was on the verge of decision in the appellate court after a contested district court trial.

The factors presented in this case have resulted in circuit decisions that simply are irreconcilable. Accordingly, certiorari should be granted to resolve the conflict in the circuits and deal with an issue that occurs in the lower courts with some frequency.

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[20]The Ninth Circuit's mootness determination in this high-profile published decision seems to depart even from its own prior decisions. The Ninth Circuit had previously concluded that a prisoner's release on parole does not render an appeal moot. *Diamontiney* v. *Borg*, 918 F.2d 793, 795 n.1 (9th Cir. 1990); *Workman* v. *Mitchell*, 502 F.2d 1201, 1207 n.7 (9th Cir. 1974).

III. Certiorari Should Be Granted Because the Decision Below Conflicts With Binding Precedent of This Court Holding That the Presence of Outstanding Unresolved Damage Claims or the Ability to Grant Some Effective Relief Precludes a Finding of Mootness.

The Court has always held that an unresolved damage claim prevents a finding of mootness.[21] The complaint here seeks damages "for defendants' constitutional torts." First Amended Complaint at 13:22, Appendix at 55. Under this Court's precedents, such a damage claim precludes any finding of mootness.

In this case, petitioner Martin may be able to recover damages for being subjected to the challenged regulations quite apart from whether the BOP "retaliated" against him for protected speech. The district court never reached his damages claims, and Martin was not permitted to put on his full evidence supporting them, because the district court bifurcated the trial. The district court limited the trial "to the so-called injunctive issues" (quoting transcript of pretrial proceedings). For that reason, there was no jury, and any further proceedings as to damages depended on the court's rulings on the equitable issues. The court thus deferred indefinitely and never decided the issues of whether the individual defendants were entitled to immunity.

The Ninth Circuit, however, remanded with directions to dismiss the "entire case" as moot. This cannot be done, under the cases holding that damage claims preclude mootness, without ruling

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[21] *See, e.g., City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989); *Board of Pardons* v. *Allen*, 482 U.S. 369, 370 n.1 (1987); *Boag* v. *MacDougall*, 454 U.S. 364, 364 (1982); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 154 n.3 (1978); *Powell* v. *McCormack*, 395 U.S. 486, 498-500 (1969) (claim for salary prevented mootness).

on the merits that no damage claim can be maintained. For example, to the extent that the prison official defendants contend that no damages can be awarded because they have a good faith immunity from such liability, this issue has to be determined on its merits before any finding of mootness could be made.

In *Board of Pardons* v. *Allen*, 482 U.S. 369 (1987), a case in which the prisoner plaintiffs had been released, the Court held that the case was not moot because the Court had not definitively resolved immunity questions and, therefore, "'the validity of [the prisoners'] claim for damages . . . [was] not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed.'" *Id.* at 370 n.1 (quoting *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978)).

Indeed, the Ninth Circuit's action in this case contradicts its own recent mootness analysis in *Yniguez* v. *Arizona*, 975 F.2d 646 (9th Cir. 1992). In that case, a state employee challenged, on federal constitutional grounds, an Arizona constitutional provision requiring all state employees to speak only English. After the plaintiff ceased to be a state employee, the State suggested that the case was moot. The Court of Appeals responded:

> Although the plaintiff may no longer be affected by the English only provision, that does not render her action moot. The plaintiff's constitutional claims may entitle her to an award of nominal damages. *See Carey* v. *Piphus*, 435 U.S. 247, 258-59 (1978). A plaintiff's pursuit of nominal damages provides a sufficiently concrete interest in the outcome of the litigation to confer standing to pursue declaratory relief and thereby prevents mootness.

975 F.2d at 647 (footnote and parallel citations omitted). If a nominal damages claim was sufficient incentive for the plaintiff in *Yniguez* to pursue declaratory relief, the same is true of petitioners' damage claims in this case.

Moreover, under this Court's precedents, a case is not moot if a party can be given "*some* form of meaningful relief." *Church of Scientology*, 61 U.S.L.W. at 4004 (emphasis by the Court). In this case, the damage claims aside, the courts can give Chronicle effectual relief by declaring the publication restrictions unconstitutional and prohibiting the BOP from enforcing them. This will allow Chronicle to exercise its editorial judgment with respect to submissions from federal prisoners in the same fashion that it does with other freelance submissions. Thus, even assuming (incorrectly) that it is now impossible for Martin to be given meaningful relief, that is not true of Chronicle.[22]

Accordingly, the Court should grant certiorari to maintain the integrity of its precedents foreclosing dismissal on mootness grounds where there is an unresolved damage claim or some other effectual relief can be granted.

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[22] Although the Ninth Circuit's order implies that Chronicle's claim is dependent on Martin's, there is no basis for such a "relational mootness" approach. A publisher such as Chronicle is every bit as much a "First Amendment 'speaker'" as is an author such as Martin. *Simon & Schuster*, 116 L. Ed. 2d at 487. Just as requiring the publisher in *Simon & Schuster* to put the author's earnings into escrow was a "disincentive[] to speak" that the publisher could challenge, *id.*, the BOP's prohibition on paid publications in news media is a disincentive to speak that Chronicle is entitled to challenge. Respondents argued unsuccessfully to the district court that Chronicle lacked independent standing to challenge the publication restrictions even though they obviously affected its editorial decisionmaking and readers. 741 F.Supp. at 1409, Appendix at 3-4. Respondents abandoned this argument on appeal.

CONCLUSION

For the reasons stated, the Court should grant certiorari, reverse the decision of the Ninth Circuit and remand the case to that court with directions to decide the merits.

Dated: December 18, 1992.

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APPENDIX

I. Order Delivered Upon Rendering of Judgment by Court of Appeals (Rule 14.1(k)(i))

[The following was filed in the Court of Appeals on April 28, 1992 (caption, counsel and date information omitted).]

ORDER

Because of appellant Martin's release on parole, we find that the entire case is now moot. The judgment of the district court, reported at 741 F. Supp. 1406 (N.D. Cal. 1990), is VACATED and this matter REMANDED with directions to dismiss on the ground of mootness.

II. Opinion of District Court (Rule 14.1(k)(ii))

[The following was filed in the district court on June 26, 1990.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANNIE MARTIN and THE CHRONICLE PUBLISHING COMPANY,	)	
Plaintiffs,	)	No. C-88-2570-CAL
v.	)	
R. H. RISON, Warden for the United States Penitentiary at Lompoc, California; TOM CURD, Assistant Warden; PAUL HOFER, Executive Assistant to the Warden; JERRY WILLIFORD, Director, Western Region Federal Bureau of Prisons; and the FEDERAL BUREAU OF PRISONS,	)	
Defendants.	)	

OPINION

This action was tried to the court, sitting without a jury, and was briefed, argued and submitted for decision. The court has heard and reviewed the testimony of the witnesses, and has reviewed the record, the exhibits admitted into evidence, the deposition transcripts admitted into evidence, the answers to interrogatories, the applicable authorities, and the arguments of counsel. This opinion constitutes the court's findings of fact and conclusions of law, as provided in Rule 52(a) of the Federal Rules of Civil Procedure. The facts stated below are found to be facts by a preponderance of the evidence, and by applying the burdens of proof discussed in paragraph VI.

I.
JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2241, and 5 U.S.C. § 702, et seq. 1982), and the first, fourth, fifth, and sixth amendments to the United States Constitution. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (e) (1982), because one defendant resided in this district at the time the suit was filed and some of the acts that gave rise to plaintiffs' claims occurred in this district.

Defendants have contested subject matter jurisdiction, on the grounds of the defense of sovereign immunity from plaintiffs' claims for monetary relief. However, because of the conclusions reached below, this court need not discuss that contention. Defendants also asserted that this court lacks subject matter jurisdiction over the claims of plaintiff The Chronicle Publishing Company, because The Chronicle lacks standing to assert those claims. That

motion was previously denied by this court. Defendants also objected to venue, but defendants' objections were denied.[1]

II.
SUMMARY OF FACTS

Plaintiff Dannie Martin is a convicted felon, who at the time of these events was incarcerated in the U.S. Penitentiary in Lompoc, California. The nature of Martin's conviction and his sentence need not be discussed here. Martin was assigned to Lompoc Penitentiary in part because his prison security level is consistent with that of Lompoc. Lompoc Penitentiary and its adjacent prison camp house approximately 2200 prisoners. Plaintiff The Chronicle Publishing Company is the publisher of "The San Francisco Chronicle," a newspaper of general circulation.

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[1]The Court now rules on the following evidentiary and procedural issues which arose during the trial: (1) Plaintiffs' motion to file a further amendment to the complaint is denied. The claims they seek to assert (that as a matter of regulatory interpretation plaintiff Martin did not violate the Bureau of Prisons regulations regarding compensation, bylines, being a reporter and conducting a business) are legally incorrect for the reasons discussed in this opinion. (2) Defendants' motion for dismissal as a matter of law, under Rule 41(b) of the Federal Rules of Civil Procedure, is denied. The issues raised in that motion are instead ruled upon in this opinion under the standard of a preponderance of the evidence and under the applicable law. (3) The declarations of N. Brooks and B. Hairsch tendered by plaintiffs, and defendants' offer of proof regarding the testimony of certain witnesses, filed on January 5, 1990, are admitted into evidence and have been considered by this court in making the findings of fact and conclusions of law. (4) All deposition designations by both plaintiffs and defendants are admitted into evidence. (5) Exhibits 1 through 31 are not admitted into evidence. Insofar as the exhibits are offered by plaintiffs to show that other inmates wrote articles and received a byline or compensation, this court is assuming those facts for purposes of this opinion. (6) Exhibits 65 through 69 are not admitted into evidence, because of lack of relevance and hearsay.

While in prison, Martin developed skills as a writer. For approximately two years before the events in question here, Martin wrote articles and submitted them to The Chronicle. His articles were generally about prison life. Some were critical of prison authorities and some were not. The Bureau of Prisons took no action against Martin for any of his articles until the Gulag article discussed below.

The Chronicle published approximately 18 of Martin's articles in a features section of Sunday editions of The Chronicle. The Chronicle treated Martin as a features writer, printed his byline on his articles,[2] and identified him as a prisoner in Lompoc. When it received articles from Martin, The Chronicle did some editing, had some conversations with Martin about changes, wrote the headlines, did the art work, and selected the pull-quotes to be set within the articles. Martin's articles were well received by the public.

The Chronicle paid Martin for each of the articles. The Chronicle's payments went to Martin's attorney, because of Bureau of Prison regulations that limit an inmate's access to cash, and because of one of the regulations at issue here.

The events causing this suit were precipitated by an article which Martin wrote and The Chronicle published, entitled The Gulag Mentality, in June 1988. When that article was published by The Chronicle and the newspaper was circulated within Lompoc prison, prison officials became concerned about possible violence. They placed Martin in administrative detention for a few days, while they conducted an investigation. Martin was then released from administrative detention. A few days later, the Bureau of Prisons transferred Martin to another federal prison, where he is still incarcerated. Martin has continued to write and publish in The Chronicle under a preliminary injunction issued by this court.

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[2]One article was published under a pseudonym, at Martin's request.

The facts surrounding these events are discussed in more detail as appropriate below.

III.

BUREAU OF PRISONS REGULATIONS

Defendants charged that Martin violated two regulations of the Bureau of Prisons, which regulations are the focal point of plaintiffs' suit.

One is 28 C.F.R. § 540.14(d)(4) (1988):

> An inmate . . . may not direct a business while confined.

The other is 28 C.F.R. § 540.20(b) (1988]:

> The inmate may not receive compensation or anything of value for correspondence with the news media. The inmate may not act as a reporter or publish under a byline.

Those sections are a part of voluminous regulations of the Bureau of Prisons for the operation of federal prisons.[3] They include many subjects not of concern in this litigation.

There are extensive regulations, some restrictive but some very permissive, regarding contacts between inmates and the outside world. Part 540, of which the two challenged regulations are a portion, expressly deals with "contact with persons in the community." Those regulations include specific sections concerning inmate correspondence with the news media, and contacts between prisoners and the news media. The obvious objectives of the regulations as a whole are to permit inmates to communicate with the outside world, and to permit the news media to have access to inmates, to the extent that those communications do not interfere with the security of a prison. Most of those

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[3]All section references to the regulations are to 28 C.F.R.

regulations need not be discussed in detail. Suffice it to say that the regulations attempt to balance the interests of the inmates, persons outside the prisons, the news media, and the security interests of the prison. The regulations also provide that they shall nevertheless be subject to the authority of the prison warden to act in preserving the security of the prison. Section 501.1 states: "When there is an institutional emergency which the Warden considers a threat to human life or safety, the Warden may suspend the operation of the rules contained in this chapter to the extent he deems necessary to handle the emergency." While this apparently refers to a suspension of all rules for all prisoners, and hence is not directly applicable to this case, it reflects the discretion vested in prison wardens when there is a danger to prison security.

IV.

PLAINTIFFS' CLAIMS

Plaintiffs challenge the two regulations on federal constitutional grounds. Essentially, they contend that both regulations are unconstitutional on their face.[4] Plaintiffs also challenge the constitutionality of the two regulations as they were applied to Martin and as they have been applied throughout the prison system. Plaintiffs make related allegations that defendants' actions against Martin were in retaliation for his criticism of prison authorities, and that Martin's due process rights were violated.

V.

THE ROLE OF THIS COURT

Before discussing the application of the constitution to the regulations and to the acts of defendants, it is important for this court to note just what its role is and is not. The court's function

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[4]Their facial challenge to § 540.14(d)(4) is as that regulation is applied to the business of writing.

is limited to determining whether defendants' regulations and acts met or violated constitutional requirements.

This court's function is not to determine whether Martin, or any other prisoner, "should" be able to write for publication. Having read Martin's articles and having heard the evidence, this court of course has its own opinions on that subject. Martin's articles are entertaining and educational. Some of them appear to have actually produced worthwhile results. Martin's writing style is light, concise, and easily readable. Many legal writers, scholars, attorneys --- and yes, judges --- could well imitate his style.

Writing by prisoners also appears to be worthwhile for rehabilitation, particularly if a prisoner such as Martin is able to use it as a base for a future career outside the prison. Writing is a healthy use of time. The writing of published articles could provide a good role model for other prisoners. And such articles, even if critical of the prison system, may provide a nonviolent means to defuse tensions within a prison. The public appears to be interested in the subject of life in prison; and light and air, literally or figuratively, are generally healthy to any institution.

But this court's role is not that of a senior editor or a censor. The task of running the federal prisons has been delegated by Congress to the Bureau of Prisons, not to the courts. The Bureau has attempted to strike a balance between freedom of expression and prison security. This court's function is limited to determining whether that balance is consistent with the constitution.

VI.

BURDEN OF PROOF

Who has the burden of proof in applying the requirements of the constitution to the regulations and to the acts of the parties?

Both the burden of going forward with the evidence and the ultimate burden of proof usually lie with plaintiffs. However, plaintiffs here assert that the burden of proof is on defendants to

demonstrate the constitutionality of the regulations. Such a shifting of the burden is proper where the regulations at issue restrict the speech of the general public. Philadelphia Newspapers, Inc, v. Hepps, 475 U.S. 767, 777 (1986). Plaintiffs also rely on Pepperling v. Crist, 678 F.2d 787 (9th Cir. 1982), subsequent appeal dismissed, 739 F.2d 443 (9th Cir. 1984) a decision of this circuit involving prisoners' challenges to state prison guidelines.

However, this court believes that plaintiffs' arguments and Pepperling have been superseded by recent decisions of the United States Supreme Court. That Court appears to place the burdens upon the prisoners who challenge the constitutionality of prison regulations. See O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987); Washington v. Harper, 110 S.Ct. 1028, 1039-40 (1990); Turner v. Safley, 482 U.S. 78 (1987); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977); Bell v. Wolfish, 441 U.S. 520, 551 (1979).

The most direct recent discussion of the burdens of proof by the Supreme Court is Thornburgh v. Abbott, 109 S.Ct. 874, 1882, n. 12 (1989). The Court said that it was not expressly passing on the evidentiary burdens or on the shifting of those burdens. But the Court extended deference to the procedures used by the district court, which applied a shifting of the procedural burdens with the ultimate burden of proof being on the prisoners.

This court believes that the initial burden is upon plaintiffs to establish a prime facie case that the regulations or the acts of defendants violated plaintiffs' claimed constitutional rights. The burden of going forward with the evidence then shifts to defendants to articulate a reasonable relationship between the regulations, their acts, and some legitimate penological objective. The burden of going forward with the evidence, and the ultimate burden of proof, is then on plaintiffs to refute that showing, or to otherwise invalidate the regulations and acts. Plaintiffs may attempt to do so

on grounds such as pretext, other alternatives, irrational conduct, or arbitrary conduct. For example, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." Turner, 482 U.S. at 89-90. Further, the regulations must operate in a neutral fashion without regard to the content of the expression. Id. at 90.

Recent Supreme Court cases might be read as defining the burden of proof to be evidence which is "substantial" or "conclusive". However, this court need not define or apply those higher measures of proof here, since it concludes that plaintiffs have not carried their burden of proof by the measure of a preponderance of the evidence.

VII.

CONSTITUTIONAL STANDARDS

The question of whether the regulations meet constitutional requirements is of course governed by the Supreme Court's decisions defining the rights, primarily the first amendment rights, of prisoners. It is clear that prisoners do have first amendment rights. But those rights must be balanced with their status as prisoners and with legitimate penological objectives. As stated by the Supreme Court in Pell v. Procunier, 417 U.S. 817, 822 (1974):

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

See also Hudson v. Palmer, 468 U.S. 517, 523 (1984).

In recent first amendment cases, the Court has extended considerable deference and discretion to the decisions of prison administrators. The Court said in Turner v. Safley,

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

482 U.S. at 84-85.

See also O'Lone, 482 U.S. at 349-350; Block v. Rutherford, 468 U.S. 576, 588 (1984); Harper, 110 S.Ct. at 1038; Abbott, 109 S.Ct. at 1879; Wolfish, 441 U.S. at 547; and Jones, 433 U.S. at 128, 129. The rationale for this judicial policy is that the problems of prison administration are ill suited to resolution by court decree, and are more rationally within the expertise and powers of the executive branches of government.

Coupled with this judicial deference to prison officials, the Supreme Court has also defined a rational relationship test. That is, prison regulations and the acts of prison officials meet constitutional standards if they are rationally related to a legitimate penological objective. Turner, 482 U.S. at 89-90; Abbott, 109 S.Ct. at 1882.

Plaintiffs contend that a stricter constitutional test is required by Procunier v. Martinez, 416 U.S. 396 (1974). Plaintiffs argue that the test defined in Martinez as survived the more recent Supreme Court cases cited above, because Martinez dealt expressly with communications going out of a prison and involved consideration of the public's interests. However, Martinez was recently discussed by the Supreme Court in Abbott, 109 S.Ct. at 1879, n. 9, and in Turner, 482 U.S at 84-89, and Martinez's holding

has been restricted and in part disapproved by the Court. And in the resent case we are not dealing exclusively with outgoing communications, as was Martinez. Here, the outgoing communications were newspaper articles which were then revised, published, and redistributed back into the prison. Indeed, the consequences of the writings were not created by sending them out, but by their publication and distribution back into the prison. Because of both that factual distinction and the Supreme Court's recent pronouncements in Turner, Abbott, and Harper, this court concludes that the Martinez standard is not the one applicable here.

Rather, the standard to be applied is that announced by the Supreme Court in Turner v. Safley. The test is whether, giving due deference to the discretion of prison officials, their regulations and acts bear a rational relationship to a legitimate penological objective. As stated in Turner v. Safley,

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators ..., and not the courts, are to make the difficult judgments concerning institutional operations."

482 U.S. at 89 (quoting Jones v. North Carolina Prisoners' Union, 433 U.S. at 128). This standard was recently restated in Washington v. Harper:

> [T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is "reasonably related to legitimate penological interests." This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.

110 S.Ct. at 1037 (quoting Turner, 482 U.S. at 89).

VIII.

DETERMINATION OF REASONABLENESS

Turner defined four factors which are relevant to a determination of the reasonableness of prison regulations and practices.

1) Whether there is a valid, rational connection between the prison regulation and the legitimate, neutral governmental interest;

2) If alternative means of exercising the constitutional right remain open to prison inmates;

3) The impact an accommodation of the asserted right would have on the guards and other inmates, and on the allocation of prison resources; and

4) The absence of ready alternatives. 482 U.S. at 89-91.

This court heard extensive testimony concerning penological objectives, the regulations, and the acts of defendants. That testimony included both percipient and expert testimony. There was little difference in the testimony of the percipient witnesses; that is, there was not much dispute as to the facts of what occurred.

There were significant differences in the conclusions reached by the penological experts. They agreed generally on the basic penological objectives, but they differed on whether these regulations and their enforcement served those objectives. The differences of opinion were grounded in part on whether the objectives are viewed from the perspective of the prisoners, or from the perspective of the prison authorities. All of the experts did agree that one of the --- if not the --- principle penological

objective is to maintain security within a prison. The term "prison security" can be and was used in several ways; e.g., to mean the absence of violence, the prevention of escape, the protection of prison staff, the protection of prisoners, and the general running of a harmonious institution. And merely invoking the word "security" can become a knee-jerk response to any changing situation. However, the experts did agree that there are genuine security concerns within a prison, and that security is a major penological objective. The U. S. Supreme Court agrees: "[C]entral to all other correctional goals is the institutional consideration of internal security ...." Pell, 417 U.S. at 823. The Turner v. Safley tests must be applied in that context.

1) Is there a valid, rational connection between the regulations and legitimate, neutral governmental interests?

Plaintiffs argue that the regulations impose a restriction on the content of prisoners' writings. However, his is not a so-called "prior restraint" case. That is, no attempt is made to edit, restrain or prevent written material from going out of the prison or from being published. The regulations do not control the content of what is said. Plaintiffs therefore argue that inmates by virtue of being prisoners can report only on prison affairs, and that a flat prohibition on newspaper reporting therefore prevents anything being written or published about prison events or conditions. But this argument ignores the fact that the regulations do allow prisoners to write via "special mail" to the news media. Section 540.20(a) (1988). Outgoing special mail may be sealed by the inmate and is not subject to inspection by the prison authorities. Section 540.18(c) (1988). Incoming special mail is opened only in the presence of the inmate, and only to allow prison staff to inspect for physical contraband. 28 section 540.18(a) (1988). The correspondence cannot be read or copied by prison officials. Id. Moreover, neither the special mail regulations nor the regulations

at issue here make any reference to the subject matter of the writings. The regulations are facially neutral with respect to content.

What are the legitimate governmental interests served by the regulations? Defendants' primary objective is prison security. The legitimacy of that governmental interest is supported by the testimony of the experts and by the above decisions of the Supreme Court. There are other valid penological interests, such as rehabilitation, which would weigh in favor of looser control by the prison authorities. But as long as prison security is a valid interest, the order of priority of the penological interests is for the Bureau of Prisons and not this court to decide.

The regulations are therefore content-neutral and for stated and legitimate governmental objective. Do the regulations rationally and reasonably promote that objective? This court believes that they do for the following reasons disclosed by the evidence:

Articles about matters within a prison can create a anger of violence, or at least threats of violence. Indeed, the testimony demonstrated that such dangers and threats occurred in Lompoc prison after the publication of the Gulag article.

Lompoc prison houses many prisoners requiring a high level of security. While most prisoners, including Martin, were a level four or below, the prison population included some at levels five and six; six is the maximum security level. There was testimony that Lompoc was a volatile population, with some gangs and with frequent disciplinary problems. There had been unrest within the prison some months earlier, when the warden temporarily limited the use of the exercise yard, and when the prison replaced chairs which some prisoners believed were theirs. Some causes of unrest were mentioned in Martin's articles prior to Gulag. One of the witnesses testified that tensions in the prison were high before

Gulag, and that there had been a planned boycott of meals and some fires. After the publication of Gulag, which gain mentioned those incidents, inmates again complained about the earlier restrictions on the hours of the exercise yard and about the replacing of the chairs, although both incidents had occurred months before.

The Gulag article appeared in the June 19, 1988 edition of The Chronicle and was received at the prison the same day. The article contained express statements about murders, assaults, and possible violence or rioting. The staff then noticed more clustering of groups of prisoners. The associate warden and a visitor were intimidated by a prisoner about Martin several days later, and the associate Warden received a threat. One of the staff members was told by his prison crew that there was going to be trouble. The staff member wrote a memorandum to his superiors with that information. There is some question whether these events and the prisoners' statements were motivated by the article or by Martin's being placed in administrative segregation. But in either event, there were indications of a security problem.

Reporting for a newspaper can also focus attention on individual prisoners in a manner which might lead to violence or unrest. Individual prisoners have their own separate interests within a prison. Some desire anonymity, and some form factions or gangs for various purposes. Most prisoners fear, or at least dislike, change in their routine or privileges. Most inmates fear a riot or violence, since it an result in either injury to them, or at least greater restrictions by the prison administration. Most prisoners do not wish to be identified or "pushed" by reporters. On the other hand, some prisoners are against whatever occurs and look for reasons for discord. There are therefore dangers, to he prisoner-reporter as well as to the prison population generally,

because of the possibility of violence, retaliation or prevention of disclosure.

Newspaper articles from within a prison can have an adverse impact on the prison staff. The staff may fear that everything they say will be reported by prisoner-reporters in the public media. They have duties of private counseling with prisoners which could be undermined by public disclosure of their confidential communications. The staff could also lose control over some of the prison population, who might act more in response to public recognition than to the requirements of the staff. Writers could become alternatives to the staff. That is, a writer, or other persons attempting to manipulate a writer, may attempt to produce the results that one group of inmates wants through public pressure. There was testimony that the prison staff was upset as a result of the article. One staff member did not want to even talk to Martin because of concern that his name or his statements could end up in a newspaper.

Permitting a prisoner to write regularly for a newspaper, and to be paid by the paper, also creates loyalties to the paper rather than to the prison authorities. While obliged to follow the orders of the prison staff, the writer-prisoner might instead be encouraged to do things which create "news" or serve the interests of a good story, which could push prisoners and staff into positions or factions that might be dangerous.

The regulations also serve a legitimate desire not to give undue prominence to a particular prisoner within the prison population. This is known as the "big wheel" problem. One of the basic principles of prison administration is the egalitarian treatment of all prisoners. Having a "big wheel" within the prison population undermines that principle. The press often concentrates on a small number of inmates, who as result become virtual public figures within the prison society and gain a disproportionate degree of

notoriety and influence among their fellow inmates. The "big wheel" problem as been recognized by the Supreme Court.

> [A]s a result those inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison.

Saxbe v. Washington Post Co., 417 U.S. 843, 848-49 (1973); see also Pell, 417 U.S. at 831-32. On the basis of this concern, the Supreme Court upheld outright prohibition of face-to-face interviews with individual prisoners in Pell and Saxbe. A prisoner writing with a byline, acting as a reporter, getting compensation, or running a business similarly poses problems of disproportionate notoriety and influence. Martin specifically testified that he wanted bylines. He valued the same recognition, and felt that it would be helpful to him to sell his other written work. He also stated that he wanted he public to take action about certain matters within a prison. The regulation against conducting a business within the prison also reduces the dangers posed by wealthy inmates, who might use their wealth (maintained either outside or inside the prison) for purposes of power and control.

The public's expectations about prisons and prisoners' activities are also relevant. The public reasonably expects that confinement in a prison will temporarily end the prisoner's outside activities. And legislation such as the "Son of Sam" statutes indicate that neither the public nor legislatures want prisoners to benefit financially from their criminal activities or from their detention in prison.

Even plaintiffs' experts testified that some of the stated security concerns were valid and were rationally promoted by the regulations at issue here. One expert agreed that having a full-time reporter in a prison would be contrary of prison security. He also

agreed that if an article does inflame conditions within a prison, it is contrary to valid security interests and the prison authorities can stop it. He stated further that a genuine security problem can override the prisoners' rights to send information in and out of the prison. Two experts testified that the prohibitions against newspaper reporting and conducting a business furthered a legitimate penological concern, not having prisoners doing things that are not supervised by the prison. They also testified that some writings can and should be prevented, such as those inducing riot, escape, violence, or even libelous attacks on the warden or the prison administration. They also testified that the prohibition against engaging in a business promotes two legitimate penological objectives, the staff's right to control the prison population and the public's concept of what activities confinement in a prison should limit.

Have the writings of prisoners actually resulted in the dangers contemplated by the regulations? The experts differed. There was evidence that at least some of those dangers did result from the Gulag article, as discussed above. Are the potential dangers offset by the benefits of more public awareness of prisons? These are questions which are not within the power of this court to decide. They are for the Bureau of Prisons to decide. As long as the regulations rationally and reasonably promote the objective of prison security, defendants are not obligated to show an actual danger to prison order and security. As stated by the Supreme Court:

> The informed discretion of prison officials that there is a potential danger may be sufficient even though this showing might be "unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public."

Jones, 433 U.S. at 133 n. 9 (quoting Pell, 417 U.S. at 825).

2) Do alternative means of exercising constitutional rights remain open to prison inmates?

If other avenues remain available for the exercise of right, "courts should be particularly conscious of the 'measure of judicial deference owed to correctional officials . . in gauging the validity of the regulation.'" Turner, 482 U.S. at 90 (quoting Pell, 417 U.S. at 827).

These regulations are part of a larger body of regulations that recognize prisoners' first amendment rights and provide for contact between prisoners and the media. The regulations here at issue are limited exceptions to the broad grants to prisoners of means for exercising their rights of expression. Prisoners retain the privilege of correspondence to and from news media representatives; Section 540.20(a) (1988). The media has access to interviews with prisoners; § 540.63. And prisoners have broad rights to communicate with members of the general public; see §§ 540.10-540.25 correspondence); §§ 540.40-540.52 (visitation).

3) What would be the impact on the guards, on other inmates, and on the allocation of prison resources if the claimed rights were accommodated?

If the alleged right to publish newspaper articles an be exercised only at the cost of significantly less liberty and safety for others within the prison, staff and prisoners alike, courts should defer to the informed discretion of correctional officials. Turner, 482 U.S. at 90; Abbott, 109 S.Ct. at 1884. The concern to be evaluated is the "ripple effect" that the exercise of a privilege can cause within the prison. Id.

Martin wrote in the Gulag article that some prisoners believed that a riot loomed, and some witnesses testified that this produced effects within the prison. There was agitation within the inmate population, security adjustments had to be made, and additional staff time had to be spent.

> Where exercise of a right requires this kind of a tradeoff, we think that the choice made by corrections officials - which is, after all, a judgment "peculiarly within [their] province and professional expertise," Pell v. Procunier, 417 U.S., at 827 - should not be lightly set aside by the courts.

Turner, 482 U.S. at 92-93.

4) Were there ready alternatives?

The absence of ready alternatives is evidence of the reasonableness of regulations. Turner, 482 U.S. at 90. Conversely, the presence of obvious and easy alternatives for achieving the penological objectives is evidence that the regulations are not reasonable but are an "exaggerated response" to prison concerns. Id. However, prison officials do not have the burden of demonstrating that a regulation is the least restrictive alternative." Id. See also, Abbott, 109 S.Ct. at 1883-1884. Even the existence of less restrictive means for achieving security objectives is not proof that the response is exaggerated. Block v. Rutherford, 468 U.S. 576, 581 (1983).

Plaintiffs argue that there are alternatives to the prohibitions imposed by these regulations. Plaintiffs contend for: censoring the newspapers when they reach the prison; controlling the time, place, and manner of the distribution of articles within the prison; or pre-publication notice to prison officials.

The Bureau of Prisons has the right to monitor incoming publications for their impact on prison security. See §§ 540.70 and 540.71, Abbott, 109 S.Ct. at 1877. However, that alternative would require prison officials to read virtually every publication coming into the prison in order to determine if it contained one article dangerous to security. In Abbott, the Supreme Court upheld a regulation which permitted the warden to prevent inmates from receiving entire publications if he determined that they contained any material detrimental to security. See Abbott, 109 S.Ct at 1877,

n.5. The Court rejected the argument that tearing out the offending sections would be an easy alternative. Id. at 1884. Similarly in Turner, the Supreme Court found that requiring prison officials to monitor inmate correspondence, in lieu of a total ban on inmate-to-inmate correspondence, would impose more than a de minimis burden on the prison system. Turner, 482 U.S. at 93. Requiring individual monitoring of daily newspapers would be an extensive burden, and would create an even greater danger to society --- the censorship of the content of daily newspapers. While alternatives to the prohibitions of these regulations might exist, the court finds that the burdens of using those alternatives would be substantial.

This court concludes that the regulations are valid under all four parts of the Turner test. They are rationally related to the legitimate penological objective of prison security.

IX.

OVERBREADTH

Plaintiffs also attack the regulations on grounds of their being overly broad. The argument is that they are broader than necessary to serve even the legitimate objective of prison security, and that they sweep within their prohibitions other constitutionally protected free speech.

If an overbreadth analysis is used, a regulation is void if it "does not aim specifically at evils within the allowable area of [government] control, but ... sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights of expression. Thornhill v. Alabama, 310 U.S. 88, 97 (1940].

However, this court does not believe that such an overbreadth analysis is required in a case involving a prisoner's writings. The United States Supreme Court has now considered and discussed the principal rights of prisoners that are protected by the first amendment: the rights of association and union

membership, in Jones v. North Carolina, 433 U.S. 119 (1976); the freedom of written expression, in Turner v. Safely, 482 U.S. 78 (1987); the right to receive information and publications, in Thornburgh v. Abbott, 109 S.Ct. 1874 (1989); and the free exercise of religion, in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987]. In each of those cases, prisoners challenged prison regulations and the Supreme Court applied a rational relationship test, without engaging in an analysis of the possible overbreadth of the regulations. Specifically, the most recent opinions in Turner, O'Lone, and Abbott demonstrate that when an attack on regulations is made by a prisoner, the four-part Turner test is the analytic framework to be used. A separate analysis of possible overbreadth is not required.

X.

VAGUENESS

Plaintiffs also attack the language of the regulations as being unconstitutionally vague. Of particular concern are the meanings of the words "business," "reporter," and "publishing under a byline."

The testimony indicated that some of the terminology used in the writing and publishing of newspapers is not precise in the industry, and that the terminology can and has overlapped. The lack of precision includes the words used to express the type of writings; e.g., items, news, opinion-editorial, letters to the editor, features, first person commentary, and articles. There is also imprecise usage of he words describing the persons who do the writing; e.g., reporter, stringer, correspondent, byline, identification line, and free-lance. All of these terms have some imprecision in definition, some overlaps, and some changes in usage over the years. But such variations in the use of words do not rise to the level of unconstitutional ambiguity.

It is easy to look at a regulation (or a statute or a contract), to see some word that doesn't expressly fit the particular facts, to then claim that is an "ambiguity," and to then argue that the ambiguity must be unconstitutional. But such a syllogism ignores the fact that constitutional rights are rights and not just exercises in semantics. Not every difficulty in using language should rise to the level of an ambiguity which is unconstitutional. All writing is subject to various meanings of words depending upon their context. A thesaurus is as important a tool in language as a dictionary. And there are few, if any, writers who can use words in any written expression without some ambiguity, or at least some necessity for the application of the words to the facts. The terms here, whether describing the writing or the writer, are not ones of precise definition or consistent usage even in the publishing industry. So the regulations can only be expected to use the words in their common sense meaning and to express their general intent.

The proper analysis is to look for: the basic rights involved, what conduct the regulations intend to permit or prohibit, and whether the words give fair notice to the reader of the conduct prohibited. The refinement of more precise distinctions must be left to semanticists. Here, the right is free speech expression, unless the exercise of that right interferes with the security of the prison. The regulations obviously intend to permit and to prohibit free speech within that spectrum. The regulations certainly give fair notice to prisoners that they should not write for compensation, work for newspapers, publish under bylines, or conduct businesses. Plaintiffs have not shown an ambiguity or vagueness which rises to the level of a deprivation of constitutional rights.

XI.

CONSTITUTIONALITY AS APPLIED

Plaintiffs' attacks on the regulations are not just in the regulations themselves. Plaintiffs also contend that the regulations

are unconstitutional as they were applied to them. This argument is made under the due process and equal protection clauses of the constitution. The line between an attack on regulations for unconstitutionality on their face, versus unconstitutionality as applied, is not always clear. When the standard is, as it is here, that a regulation is to be upheld if it is reasonably related to a legitimate penological objective, the regulation itself and the application of that regulation become interwoven.

The question of whether a regulation was constitutionally applied to an individual is judged according to equal protection standards. Wayte v. United States, 470 U.S. 598, 608 (1985). Plaintiffs make several claims in that regard. (1) They point to other activities in which prisoners are allowed to engage, and from which they make some compensation. (2) They point to other prisoners who have written for compensation. (3) They argue that some prison officials knew that Martin was writing for compensation, but took no action against him until the Gulag article. (4) These claims also involve plaintiffs' contention that defendants' stated reason for applying these regulations was simply a pretext for punitive action against Martin and The Chronicle. These contentions will be examined in this and the next sections.

A.

Federal prisoners are allowed to engage in some activities in prison and to make some compensation from those activities. They include: hobby craft, where prisoners can make and sell their art work and handicraft; work for Unicor Industries, a prison-supervised manufacturing company; and other types of writing for publication, including fiction, poetry, books and scripts. However, the similarities between those permitted activities and Martin's prohibited activities lead to unconstitutional distinctions.

In order for there to be an unconstitutional denial of due process or equal protection, there must be first some legally

recognized right or liberty interest that is protected. Meachum v. Fano, 427 U.S. 215, 223-24 (1976). The United States Supreme Court has specifically held that inmate activities and rehabilitation programs are delegated by congress to the "full discretion" of the Bureau of Prisons, and that they do not create a "legitimate statutory or constitutional entitlement sufficient to invoke due process." Moody v. Daggett, 429 U.S. 78, 88 n. 9 (1976). The Ninth Circuit has agreed; Rizzo v. Duncan, 778 F.2d 527, 531 (9th Cir. 1985). As stated by another circuit in Sellers v. Ciccone, 530 F.2d 199, 201 (8th Cir. 1976), "courts will not, as a general rule, audit the exercise of that discretionary power."

A prisoner can make an equal protection claim against prison officials only if the treatment was "invidiously dissimilar to that received by other inmates." Peck v. Hoff, 660 F.2d 371, 373 (8th Cir. 1981); Black v. Lane, 824 F.2d 561, 562 (7th Cir. 1987); See also Moody v. Daggett, supra. Several cases have recognized that the prohibitions against prisoners receiving compensation or running a business in prison are constitutional limitations. Procunier v. Martinez, 416 U.S. at 414 n. 14; Johnson v. Avery, 393 U.S. 483, 490 (1969); Garland v. Polley, 594 F.2d 1220 (8th Cir. 1979); Valentine v. Gray, 410 F. Supp. 1394, 1396 (S.D. Ohio 1975). The reason is that such limitations are part of the restrictions of activities that are generally incident to lawful incarceration; Price v. Johnston, 334 U.S. 266, 285 (1948). A decision of this circuit is particularly appropriate here; Stroud v. Swop, 187 F.2d 850, 851 (9th Cir. 951), cert. denied, 342 U.S. 829 (1951). The Ninth Circuit there held that an inmate had no right to secure publication of a book he wrote, or to engage in general correspondence with outsiders to promote that business.

The above authorities support the conclusion that Martin has no right to engage in writing for compensation. It is a privilege, not a constitutional right, and one that the Bureau of Prisons may

regulate, even on a selective basis if the objective of the regulation is legitimate. The legitimate objective in this case was prison security, and the regulation was applied reasonably. Martin's writing did invoke concerns for prison security at Lompoc.

There is a valid distinction between writing newspaper articles and other types of writing. The immediacy of newspaper information, and its recirculation into the prison, are key differences which raise valid concerns about security. Newspaper articles are therefore distinguishable from other types of prisoner activities which do not pose security problems.

B.

The same points and authorities answer plaintiffs' argument that other prisoners within the federal prison system have written for compensation.

There was extensive evidence, primarily by way of deposition, that other federal prisoners have written for publication and have successfully marketed their writings. The evidence disclosed perhaps two instances of prisoners who wrote under a byline for a newspaper, although it was questionable whether they had acted as a reporter and had received compensation. It was also uncertain whether the Bureau of Prisons took any disciplinary action against them, but the court will assume that the Bureau did not.

This claim of disparate treatment led the parties into extensive discovery and arguments about each instance of successful prison writing, including numerous justifications asserted by defendants. But this court does not believe that a detailed analysis of that evidence or those arguments is necessary. As stated, engaging in writing activities is not a constitutionally protected right, either for purposes of due process or equal protection. Such activities are delegated by Congress to the discretion of the Bureau of Prisons. And the line which defendants

have drawn here --- i.e., writing which effects prison security --- is reasonably related to a legitimate penological objective.

As stated by the U.S. Supreme Court, "[t]here is nothing in the constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." Jones, 433 U.S. at 136. Fully consistent treatment of a large group of prisoners, with varying factual circumstances, is virtually impossible. Even one of plaintiffs' experts testified that not all inmates can be given privileges which are fully equal. And variations in treatment do not all rise to the level of constitutional violations.

C.

Numerous employees at Lompoc prison did know that Martin was writing for The Chronicle before the Gulag article appeared, and one or two employees of the Bureau's regional office also knew. It is less clear whether they knew the extent or regularity of Martin's writings, and whether they new that he was being compensated. The warden and other administrative staff at Lompoc prison had no knowledge of Martin's prior writings before Gulag was published.

No one took any action concerning Martin's writings before Gulag. Indeed, Martin's articles were cited as a actor in his favor during his parole hearings before the United States Parole Commission. Martin argues that because no action was taken before the publication of Gulag, enforcing the regulations after Gulag, an article critical of prison authorities, was an unconstitutional deprivation of his due process and equal protection rights.

For the reasons stated, this court doubts that the asserted right is a right at all, rather than a privilege which the Bureau of Prisons is free to administer for a legitimate penological objective.

But even if a right were involved, the decision whether to enforce every breach of a regulation is a discretion vested in the Bureau of Prisons. 18 U.S.C. § 4001, § 4081; regulations § 541.10(b)(2), § 541.14, § 541.23(a) and (d); Sellers v. Ciccone, 530 F.2d 199, 202 (8th Cir. 1976). Not all violations of prison regulations are prosecuted. Rather, there is an exercise of proper discretion by prison staff in deciding what to prosecute.

One Bureau official testified that he first saw an article by Martin in late 1986, and he believed then that it violated the regulations. He was concerned, but after consulting with the Bureau's attorney and with the then warden, he had no reason to believe that the article raised any concern for security and decided not to take any action. He later saw two other articles which were critical of prison authority; but after discussions, he again decided not to do anything because, although critical, they posed no security problems. The Bureau of Prisons did act after Gulag because of concerns for security created by that article. Gulag contained statements about violence and rioting. And Martin testified that the thought there was a riot coming, that there as a potential for violence, and that the article might influence the public.

The fact that defendants did not respond to Martin's earlier articles, which they believed did not create security concerns, but did act after Gulag, which did give rise to security concerns, is not so unreasonable or arbitrary as to rise to the level of a constitutional violation. To succeed on a claim of selective enforcement, plaintiffs must show that the enforcement of the regulations was "motivated by a discriminatory purpose." Wayte, 470 U.S. at 697. The court finds that the enforcement at issue here was for the purpose of the security of the prison. The regulations were not applied as a pretext for punitive action against Martin or

The Chronicle, but in furtherance of a genuine penological concern for security.

XII.

THE SEGREGATION AND TRANSFER OF MARTIN

Martin also challenges the acts of defendants after the Gulag article appeared. He was placed in administrative detention for a few days, was then returned to the general prison population, and was then abruptly transferred to another federal prison. Martin attacks those acts on grounds of alleged violations of due process and equal protection.

This court finds from the evidence that defendants acted because of a genuine concern for prison security and for no other reason. The necessity for some action was the result of events and conditions within the prison after Gulag was published. Defendants conducted an investigation, engaged in deliberative discussions, and conferred with the general counsel of the Bureau of Prisons. Whether their concerns about security were or were not accurate in retrospect is not he issue here. The point is that defendants acted from a genuine concern about security. That finding is supported by events and conditions in the prison which have already been discussed, and by the following facts.

Many witnesses testified to changes in the mood of he prison population at the time of the publication of Gulag, Martin's administrative segregation, and then his release into the general population. The changes in mood were variously, and perhaps inconsistently, described. But the testimony was consistent that there were changes, and that changes are an indicator of potential difficulties within the prison.

It is a practice of prison officials to make themselves available to the inmates at the prisoners' noon meal. This is an opportunity for prisoners to approach the warden and his staff and to express complaints, suggestions, or requests. Ordinarily,

numerous inmates approach the warden and his staff each day. However, on June 20, the day after Gulag appeared, no inmates approached the warden or the staff. The silent treatment continued on June 21. The associate warden was later approached by two inmates, who told him that the article was not representative of the views of all of the inmates. While that information may have been consoling, it nevertheless raised the question of possible factions of inmates.

When the warden received a copy of the Gulag article, he became concerned about its effects on the prison, and called a meeting of his staff. Many of the staff had not seen he article before meeting with the warden. The staff discussed their concerns about possible violence against prison authorities, and also their concerns about possible prisoner retaliation against Martin. The article reported an unnamed inmate as saying that the warden was trying to start a riot and that the inmates might as well give him a riot and get it over with. The staff's concern was not only about a riot, but also that inmates might take some action against Martin for quoting them, to prevent him from identifying them to the staff, or for perhaps for creating a violent situation where none had existed. The chief of prison security was particularly worried about a riot and about the safety of Martin. These concerns were expressed and discussed against a background of riots that had recently occurred at two other federal prisons.

The warden and his staff decided that it was necessary to put Martin into administrative segregation, for his own protection, while an investigation of possible violence, either generally or against Martin personally, could be made. One of the experts testified that such administrative detention was proper. The standard, and indeed the required, operating procedure is that protective action be taken while an investigation is conducted.

An investigation was promptly conducted. A few days later, when the investigation indicated that there was probably no personal danger to Martin, he was released from administrative detention and returned to the general prison population. However, the prisoner population appeared to remain polarized even after Martin was released from administrative segregation.

The investigation continued. The warden left to attend a conference of wardens in another state, but conferred with the Lompoc staff by telephone daily. They concluded that tensions at the prison were becoming precarious, and that the inmates were choosing sides over the issue of Martin and his writing. The investigation included tape-recorded telephone conversations between Martin and The Chronicle editor, in which Martin and the editor discussed that Martin would continue to write about matters at the prison. The recordings disclosed that Martin intended to write an article about the high security unit within the prison and about the inmates here. Because of the nature of that unit, and the special prisoners who are housed there, disclosure of their identities or the reasons for their segregation could result in potential violence. The tape recorded conversations between Martin and The Chronicle indicated that further articles would be written "to keep pressure and heat on" the warden.

As a result of the investigation and the tense conditions at the prison, the warden and his staff concluded that Martin should be transferred. A warden does not have the authority to order the transfer of a prisoner without the approval of the regional director of the Bureau. The warden therefore contacted the regional director, who was also attending the warden's conference. They also sought the opinion of the general counsel of the Bureau of Prisons. The situation was discussed in detail, and the general counsel's opinions were solicited. As a result of the consultations

and opinions, the regional director authorized Martin's transfer from Lompoc.

Martin was transferred on June 30. The method of removing Martin from Lompoc and transferring him to another prison was more hasty than the usual procedures for the transfer of a prisoner. However, the haste was justified by genuine concerns for security. The transfer of Martin had the actual result of gradually defusing the tensions within the prison.

Martin alleges a violation of his due process rights because he was transferred to another prison without the use of the normal procedures. While his transfer was done in haste, and without a hearing, no procedural due process rights were violated. The Bureau of Prisons was within its authority to determine that the interests of the security of the prison required Martin's prompt transfer. The transfer was administrative and not punitive in nature; that is, no punishments were otherwise imposed on Martin, such as deprivations of his privileges or a delay of his release date. One of plaintiffs' experts agreed that transfer is an option to avoid problems. He said that a warden should investigate, weigh the information, and consider the negative implications. Another expert testified that a warden can taken action to protect a prisoner or to prevent him from becoming the cause of a disturbance, and such action can properly include administrative segregation or transfer. The warden, the prison staff, and the Bureau of Prisons properly did so in his case.

Plaintiffs argue that there is no real difference between administrative action and disciplinary action. That is, both resulted in Martin's being in stricter detention and then being transferred, and both should invoke due process protection. But the evidence and the law demonstrate that there is a genuine difference between administrative action and disciplinary action, even though some of the results to the prisoner may be the same. The differences are

real and are not just words. The regulations themselves draw distinctions, both in substance and in procedure, between segregation for the purpose of discipline versus segregation for the purpose of administrative detention and protection. See Part 541, and particularly §§ 541.22 and 541.23. Administrative detention or transfer can be used for protection, for investigation, or for reclassification, and they involve no penalty or punishment such as the ultimate loss of privileges or a delay in the date of the prisoner's release from prison. Disciplinary action, on the other hand, as a sanction which can result in a loss of privileges, and in report to the Parole Commission which could affect the prisoner's ultimate release date. Disciplinary action can therefore only be taken after a hearing.

Martin also argues that his substantive due process rights were violated, because under a table of prohibited acts and their punishments, set forth in Table 3 of § 541.13, the penalty for conducting a business is limited to the prisoner being restricted to his quarters. However, as stated, the actions against Martin were not disciplinary. And Martin does not have a constitutionally protected liberty interest in the punishment stated in the table which cannot be offset by valid concerns for prison security. Section 541.13, Table 3, Code 399 authorizes segregation and transfer for conduct which interferes with security. See also, §501.1 quoted above. The case authorities suggest that a prisoner can be transferred, even for engaging in permitted first amendment activity, if he Bureau of Prisons has legitimate security concerns. Baraldini v. Thornburgh, 884 F.2d 615, 620-21 (D.C. Cir. 989). The method of analysis of a prisoner's claimed rights is again the Turner v. Safely standards. See also Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982); Olim v. Wakinekona, 461 U.S. 238 (1983); and Montanye v. Haymes, 427 U.S. 236 (1976).

This court finds and concludes that Martin was transferred, under the administrative procedures of the Bureau of Prisons, for valid reasons of prison security, and was not transferred as a pretext or for purposes of retaliation.

XIII.

THE CHRONICLE

This opinion has used the term "plaintiffs" without such differentiation between Martin and The Chronicle.[5] The court must now address the question of whether the fact that a newspaper is a party requires a stricter constitutional analysis.

The Chronicle argues that it has different constitutional rights, which require different analysis, because of the nature of its functions. It decides what to publish. It decides whether an item will be printed as news, an article, an editorial opinion, a special feature, or the like. It decides whether to give the writer a byline. It writes the headlines, does the art work, and selects the pulluotes. These are different functions from those of the writer, which The Chronicle calls "editorial discretion." These matters are indeed within its discretion. But the use of the label "editorial discretion" does not necessarily invoke some different level of constitutional rights. The Court must still examine whether the regulations really impact newspaper's discretion.

The regulations do not inhibit the content of what is printed by The Chronicle. They do not authorize the Bureau of Prisons to tell The Chronicle what can or cannot be printed, and the Bureau has not attempted to exercise such a power. The Chronicle is free to publish whatever it wants. And as already noted, there are extensive regulations which assure newspapers access to prisoners and to prison information. The regulations are addressed to the

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[5]The claim of Nancy Hoffman, a reader of Martin's articles in The Chronicle, was previously dismissed.

prisoners, and not to the news media. And restraints on an author do not automatically constitute interference with the editorial discretion of publication; see Pell v. Procunier, infra.

The Chronicle argues for a stricter standard of judicial review, and hence a higher level of constitutional rights, by reference to Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973). Specifically, the Supreme Court said in that case,

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

While that quotation is unimpeachable first amendment law, it is not the issue in the present case. The legislation at issue in Miami Herald specifically dealt with what the newspaper was required to print. The regulations at issue here do not. The Chronicle is free to print or to reject whatever it wants of Martin's writings. The restraints which the regulations place on Martin as a prisoner do not prohibit The Chronicle from publishing anything that he sends to them.

The U. S. Supreme Court has upheld restrictions on the access of the press to prisoners; Pell v. Procunier, 417 U.S. 817 (1973). And in Saxbe v. Washington Post, 417 U.S. 843 (1973), the Court held that prohibiting interviews between newspapers and prisoners did not abridge freedom of the press.

The Chronicle argues that any restrictions on Martin, its source of information, interfere with its right to gather the news.

The Supreme Court did recognize in Pell that the function of news gathering may implicate first amendment rights. However, the court said that

> The Constitution does not, however, require government to accord the press special access to information not shared by the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public .... It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

417 U.S. at 834-35 (footnote and citations omitted).

Under its present regulations, the Bureau of Prisons gives the press greater access to information than the general public. Prisoners can send writings to the news media as "special mail," which prison authorities may not read. The regulations also afford the news media the opportunity for personal interviews with prisoners. The regulations do not unduly limit The Chronicle in its sources of information. The regulations do not prevent The Chronicle from reporting on prisons or prisoners.

The restrictions which the regulations place on Martin do not deprive The Chronicle of any higher rights of constitutional dimension. The rights of The Chronicle in this case are still governed by the Turner v. Safely standards. This was made clear by the U. S. Supreme Court in Abbott:

> We do not think it is sufficient to focus ... on the identity of the individuals whose rights allegedly have been infringed. Although the court took special note in [Martinez] of the fact that the rights of non-

> prisoners were at issue, and stated a rule in [Turner] for circumstances in which 'a prison regulation impinges on inmates constitutional rights,' any attempt to forge separate standards for cases implicating the rights of outsiders is out of step with the intervening decisions in [Pell, Jones, and Bell]. These three cases, on which the court expressly relied in Turner when it announced the reasonableness standard for 'inmates' constitutional rights' cases, all involve regulations that affected rights of prisoners and outsiders.

109 S.Ct. at 1879, n.9.

XIV.
CONCLUSIONS

For the reasons stated, this court finds and concludes that the penological interest of prison security was invoked by Martin writing and The Chronicle publishing the Gulag article. The fact that there was a genuine concern for security was established by a preponderance of the evidence. The regulations at issue bear a reasonable relationship to that bona fide penological interest. The application of the regulations, and the segregation and transfer of Martin, were not arbitrary or capricious, and were not for purposes of retaliation. Prison security was not a pretext for punishing he content of Martin's writings.

Specifically with respect to the causes of actions alleged in the first amended complaint, the court finds and concludes that: plaintiffs' first amendment rights of freedom of speech and freedom of the press were not violated; Martin's due process rights under the fifth and sixth amendment were not violated; plaintiffs' rights of equal protection under the fifth and fourteenth amendments were not violated; defendants' conduct was not arbitrary or capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 702

(1982); and defendants' actions were objectively reasonable, and were not malicious or oppressive.[6]

In conclusion, the court hopes that the Bureau of Prisons will not misinterpret this result. It is not carte blanche for the Bureau to restrain opinions which it does not like. In a civilized society governed by the rule of law, voices of dissent cannot and should not be suppressed. History has been punctuated by writers who have emerged from prison cells to become spokesmen for humanity. As the United States Supreme Court has held, and as the Bureau of Prisons itself recognizes, prisoners do have first amendment rights. When those rights conflict with a genuine concern for prison security, as in this case, restraint can be imposed. But the word "security" cannot be just a label invoked to shield all actions from scrutiny. While the decisions of the Supreme Court and this court accede to the Bureau's discretion when properly exercised, that is not a totally "hands-off" principle. As the length of this case -- and indeed this opinion -- demonstrates, federal courts will scrutinize the validity of prisoners' claims.

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[6]The first amended complaint (paragraph twenty-nine), also alleges a cause of action for the search and seizure of Martin's personal possessions, as unreasonable under the fourth amendment. Little if any testimony was introduced at trial pertaining to that issue. The court believes that the genesis of that allegation was a taking of Martin's writings and writing materials by defendants when he was transferred, which this court later ordered to be returned to him. Martin as subsequently continued to write. The court concludes from the evidence, or lack of evidence, that Martin has not established any violation of his fourth amendment rights which entitle him to further redress by this court on that cause of action.

IT IS THEREFORE ORDERED that the preliminary injunction is dissolved and that judgment be entered for defendants and against plaintiffs.

Dated: June 26, 1990.

[SIGNED]

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

III. Order on Rehearing (Rule 14.1(k)(iii))

[The following was filed in the Court of Appeals on September 21, 1992.]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CHRONICLE PUBLISHING CO., Plaintiff-Appellant, v. R.H. RISON, etc., et al., Defendants-Appellees.	No. 90-16103 DC No. CV-88-2570-CAL
DANNIE MARTIN, Plaintiff-Appellant, v. R.H. RISON, etc., et al., Defendants-Appellees.	No. 90-16122 DC No. CV-88-2570-CAL ORDER

Before: D.W. NELSON, HALL and FERNANDEZ, Circuit Judges.

Judges Hall and Fernandez voted to deny the petition for rehearing. Judge D.W. Nelson voted to grant the petition for rehearing. The panel voted unanimously to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IV. Pertinent Text of Constitutional Provisions and Regulations Involved (Rule 14.1(f))

A. U.S. Const. art. III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . .

B. U.S. Const. amend. I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

C. U.S. Const. amend. V

. . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

D. 28 C.F.R. § 540.20(b) (1992)

The inmate may not receive compensation or anything of value for correspondence with the news media. The inmate may not act as reporter or publish under a byline.

E. 28 C.F.R. § 540.14(d) (1992)

. . . Correspondence which may be rejected by a Warden includes, but is not limited to, correspondence which contains any of the following:

. . .

(4) Direction of an inmate's business (See § 541.13, Prohibited Act No. 408). An inmate, unless a pre-trial detainee, may not direct a business while confined. . . .

F. 28 C.F.R. § 540.45 (1992)

No inmate is permitted to engage actively in a business or profession. . . .

G. 28 C.F.R. § 541.13 (1992)

. . .

TABLE 3--PROHIBITED ACTS AND DISCIPLINARY SEVERITY SCALE

. . .

LOW MODERATE CATEGORY

. . .

[First column of table, "Code":] 408

[Second column of table, "Prohibited ~~Acts~~":] Conducting a business

[Third column of table, "Sanctions":]

B.1 Disallow ordinarily up to 12.5% (1-7 days) of good conduct time credit available for year (to be used only where inmate found to have committed a second violation of the same prohibited act within 6 months); Disallow ordinarily up to 25% (1-14 days) of good conduct time credit available for year (to be used only where inmate found to have committed a third violation of the same prohibited act within 6 months) (a good conduct time sanction may not be suspended).

E. Make monetary restitution.
F. Withhold statutory good time.
G. Loss of privileges: commissary, movies, recreation, etc.
H. Change housing (quarters).
I. Remove from program and/or group activity.
J. Loss of job.
K. Impound inmate's personal property.
L. Confiscate contraband.
M. Restrict to quarters.
N. Extra duty.
O. Reprimand.
P. Warning.

. . .

V. First Amended Complaint for Declaratory, Injunctive and Monetary Relief for Violation of Constitutional Rights (Jury Trial Demanded)

[The following was filed by petitioners in the district court on August 17, 1988 (cover page and exhibits omitted).]

PRELIMINARY STATEMENT

1. This suit centers on the First Amendment rights of a federal prison inmate, Dannie Martin, one of California's largest newspapers, The San Francisco Chronicle ("the Chronicle"), and the Chronicle's readers, including the plaintiff Nancy Hoffman. Mr. Martin has become a celebrated freelance writer for the Chronicle over the past two years. On June 19, 1988, the Chronicle published an article by Mr. Martin which was critical of R.H. Rison, the Warden at the Lompoc, California, penitentiary where Mr. Martin was incarcerated. Shortly thereafter, Mr. Martin was placed in solitary confinement and later transferred to the Metropolitan Correctional Center in San Diego, California and then to the Federal Correctional Institution in Phoenix, Arizona. These actions by defendants are in retaliation for Mr. Martin's exercise of his rights to free speech, and seriously infringe upon the Chronicle's rights to freedom of the press, and frustrate the rights of Ms. Hoffman and other Chronicle subscribers to read commentaries by Mr. Martin. Mr. Martin fears that he will be subject to further retaliatory conduct for his writing, such as being placed on the federal prison system's "merry-go-round" whereby he will be shuffled from prison to prison to render it more difficult to exercise his First Amendment and other rights.

JURISDICTION AND VENUE

2. This is a suit against federal officers and the United States Bureau of Prisons. It involves questions which arise under

the United States Constitution and the Administrative Procedure Act. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331, 1361, 2201 & 2241, 5 U.S.C. § 702 and directly under the Amendments to the Constitution which defendants are violating as alleged herein. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because defendant Jerry Williford resides in this judicial district and the claims detailed below arose in this judicial district.

PARTIES

3. Plaintiff Dannie Martin had been an inmate at the Federal Penitentiary in Lompoc, California, from 1980 until June 30, 1988, when he was transferred to the Metropolitan Correctional Center, a federal prison facility located in San Diego, California. On July 7, 1988, Mr. Martin was transferred again to the Federal Correctional Institution in Phoenix, Arizona, where he is current incarcerated.

4. Plaintiff The Chronicle Publishing Company (the "Chronicle") publishes The San Francisco Chronicle, a newspaper with one of the largest circulations in the State of California. The Chronicle contributes certain sections to the San Francisco Sunday Examiner and Chronicle, including the "Sunday Punch" section.

5. Plaintiff Nancy Hoffman is a resident of this judicial district and has read many of Mr. Martin's articles as such articles were published from time to time in the "Sunday Punch."

6. Defendant R.H. Rison is the Warden of the Federal Penitentiary in Lompoc, California, and is responsible for that penitentiary's day-to-day administration. Mr. Rison is sued in both his official and individual capacities.

7. Defendants Tom Curd and Paul Hofer are the Assistant Warden and the Executive Assistant to the Warden, respectively, at the Lompoc penitentiary, and assist Warden Rison in his

administration of the facility. Messrs. Curd and Hofer are sued both in their official and individual capacities.

8. Defendant Jerry Williford is the Director of the Western Region of the Federal Bureau of Prisons and is responsible for the daily administration of that Region. In this capacity, he supervises the operations of the federal penitentiary at Lompoc, California. Mr. Williford is sued in both his official and individual capacities.

9. Defendant Michael Quinlan is the Director of the Federal Bureau of Prisons and is responsible for administering all aspects of that Bureau, including penitentiaries such as the one at Lompoc, California, and federal correctional institutions such as the one at Phoenix, Arizona. Mr. Quinlan is sued in his official capacity as described above.

10. Defendant Federal Bureau of Prisons is an administrative agency of the United States Government that supervises the administration and operation of the federal prison system. Plaintiffs seek declaratory and injunctive, but not monetary, relief against defendant Federal Bureau of Prisons.

FACTUAL ALLEGATIONS

11. Dannie Martin has had approximately 20 articles published in the Chronicle's "Sunday Punch" section over the last two years. These articles have discussed a wide array of topics, ranging from prison folklore to contemporary events, particularly instances of injustice. Mr. Martin's writing has been nominated for a national media award, has evoked inquiries from major national newspapers, and has elicited extensive responses by readers as far away as Australia and Switzerland.

12. The Sunday edition of the Chronicle has a circulation exceeding 700,000. The "Sunday Punch" is among the two or three most popular sections of the Sunday Chronicle. Mr. Martin has become an extremely popular writer for the Chronicle and has

developed a personal rapport with the readership. Ms. Hoffman is one of many such readers.

13. Defendants have been aware of Mr. Martin's articles in the Chronicle as those articles have been published from time to time over the last two years. Indeed, at Mr. Martin's parole board hearing last summer, Mr. Martin was informed by the parole board that if he continued to keep up his good work in writing for the Chronicle, then the parole board at its next hearing likely would subtract time from his target prison release date.

14. On June 19, 1988, an article by Mr. Martin was published in the Chronicle's "Sunday Punch." this Article concerned what Mr. Martin perceived to be the rising tensions at Lompoc penitentiary. This Article specifically criticized Warden Rison. Attached hereto as Exhibit 1 is a true and correct copy of the Article.

15. Two days after the Article was published Mr. Martin was placed in solitary confinement without an opportunity to be heard. Shortly after Mr. Martin was put in solitary confinement, defendant Hofer indicated in the June 23, 1988, San Francisco Chronicle that Mr. Martin had been placed in "protective custody" and that his confinement could last up to two weeks while the prison administration's investigation concerning Mr. Martin's safety continued. Mr. Martin also learned that he was being held on suspicion of encouraging a group demonstration.

16. On the morning of June 23, 1988, substantial press attention was devoted to Mr. Martin's situation. Both the Chronicle and the Associated Press released stories concerning Mr. Martin's solitary confinement. During the afternoon of June 23, 1988, Mr. Martin was released from solitary confinement and returned to the general prison population.

17. While Mr. Martin was in solitary confinement, defendant Rison made public statements hostile to Mr. Martin and his

writings in the Chronicle. On a local radio program, defendant Rison stated that the Lompoc penitentiary was not "big enough" for both him and Mr. Martin. Defendant Rison also told the Associated Press on June 23, 1988: "As long as I am not going to be given a chance by the Chronicle to respond and the newspaper published whatever he [Mr. Martin] writes unedited as fact, I don't plan on leaving this fellow in this institution."

18. Notwithstanding the statements made in the preceding paragraph, defendant Hofer, as the spokesman for the Lompoc prison administration, stated in an interview on Friday, June 24, 1988: "From now on Dannie is free to write anything he wants." Similarly, during the evening of June 23, 1988, after Mr. Martin had been released from solitary confinement, defendant Rison told Chronicle "Sunday Punch" editor Peter Sussman that his prison administration would follow an "open-door policy" with respect to Mr. Martin's writing. When Mr. Sussman informed defendant Rison that he had previously received information from a Lompoc prison official suggesting that Mr. Martin could not be paid for his work nor could any of his writings carry his name, defendant Rison replied that if there were such limitations they would be "ignored by this prison administration."

19. On Thursday, June 30, 1988, Mr. Martin was suddenly transferred from the Lompoc penitentiary to the San Diego Metropolitan Correctional Center. Mr. Martin was seized from a handball court at approximately 12:45 p.m., and taken to a waiting van. Attached hereto as Exhibit 2 is a true and correct copy of the press release by Lompoc prison officials concerning Mr. Martin's transfer. The press release charges that Mr. Martin had "become a compensated byline journalist" in violation of Federal Bureau of Prisons policy.

20. The reason given for Mr. Martin's solitary confinement was pretextual, and actually was in retaliation for the publication

of Mr. Martin's Article and past articles in the Chronicle. At the time that Mr. Martin was placed in solitary confinement, there was no genuine threat to his personal safety due to the Article. In fact, the Article was praised by Mr. Martin's fellow prison inmates. At no time had or has Mr. Martin encouraged a group demonstration at the time he was isolated from the general prison population.

21. Mr. Martin's transfer from Lompoc similarly was pretextual, and was designed to retaliate against the publication of the Article and past articles in the Chronicle. Lompoc prison officials had been aware for quite some time prior to the transfer that Mr. Martin's articles were being published by the Chronicle.

22. Mr. Martin fears that further retaliation against him by defendants is imminent. A common practice of defendants is to place "uncooperative" prisoners on the "merry-go-round," whereby they are repeatedly transferred from prison to prison so that it will be difficult, if not impossible, for them to exercise their constitutional rights or even normal privileges, such as meeting with visitors.

23. On June 30, 1988, when Mr. Martin was transferred from Lompoc, he was not permitted to take any of his personal belongings. Included among those belongings were extensive writing materials, such as the text of his unfinished novel, notes for potential stories, and books that he relied upon as writing resources. On or approximately June 30, 1988, defendants searched Mr. Martin's personal property and seized communications to Mr. Martin from his attorney. In addition, when Mr. Martin's personal property was returned under court order approximately ten days later, certain possessions were damaged or missing.

24. Pursuit of any alleged administrative remedies in this case would be futile, given the extreme time constraints and the seriousness of the constitutional deprivations that plaintiffs are currently suffering. Moreover, the administrative process at

Lompoc penitentiary, Metropolitan Correctional Center in San Diego, and Phoenix Federal Correctional Institution has been ineffective and illusory for Mr. Martin. Indeed, Mr. Martin has been informed by a disciplinary hearing officer that all alleged administrative procedures relating to Mr. Martin have been postponed pending the hearing on plaintiffs' motion for preliminary injunction in this action.

25. Defendants' unconstitutional conduct as alleged above is continuing and, unless and until restrained by order of this Court, will cause great and irreparable harm to plaintiffs. Plaintiffs have no adequate remedy at law for the injuries that they are currently suffering and will continue to suffer. Injunctive relief of an extraordinary nature therefore is essential to prevent irreparable injury in this action.

CAUSES OF ACTION

26. The above-described conduct of defendants denies plaintiffs' rights to freedom of speech and freedom of press, in contravention of the First Amendment to the United States Constitution. In particular, 28 C.F.R. § 540.2(b) is unconstitutional on its face and as applied and is unconstitutionally vague, overbroad and discriminatory. 28 C.F.R. § 540.14(d)(4) (Code 408, Conducting A Business) is inapplicable to Mr. Martin, and defendants' conduct furthermore is mere pretext for retaliation against plaintiffs' exercise of their First Amendment rights.

27. The above-described conduct of defendants denies plaintiff Martin due process of law and effective representation by counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

28. The above-described conduct of defendants violates plaintiffs' rights to equal protection under the law, as guaranteed under the Fifth and Fourteenth Amendments.

29. The above-described conduct of defendants, including but not necessarily limited to defendants' search and seizure of Mr. Martin's personal possessions as described above, violated Mr. Martin's right against unreasonable search and seizure, as guaranteed by the Fourth Amendment.

30. The above-described conduct of defendants, in some instances contrary to defendants' own administrative regulations, is arbitrary and capricious and is in violation of the Administrative Procedure Act. (See 5 U.S.C. § 702).

31. Defendants' constitutional violations, as alleged in paragraphs 1-30 above, were not objectively reasonable, as measured by reference to clearly established law. Moreover, defendants' conduct, which constituted the constitutional violations alleged, was knowing, malicious and oppressive.

WHEREFORE, Plaintiffs request that this Court grant the following declaratory, injunctive, and monetary relief:

A. A declaratory judgment which:

1. finds that the acts, policies and practices of defendants as herein described and complained of violate the plaintiffs' rights as described in paragraphs 26-30 above;

2. finds that defendants' acts were not objectively reasonable, as measured by reference to clearly established law.

B. A temporary restraining order, and a preliminary and permanent injunction which:

1. prohibits the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them, from transferring Mr. Martin to another prison facility until the completion of this case, and permitting transfer of Mr. Martin after completion of this case, following the remedial transfer requested by clause 9 below, only upon Mr. Martin's consent or upon noticed motion by defendants to this Court for good cause shown whereby defendants must affirmatively

demonstrate that the proposed transfer is not in retaliation for the exercise of Mr. Martin's constitutional or other rights;

2. prohibits the defendants, their successors, officers, agents, employees and all other persons acting in concert or participation with them, from depriving Mr. Martin of any rights and privileges that other inmates at the penal institution at which he is incarcerated are afforded;

3. prohibits the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them, from retaliating against either Mr. Martin or the Chronicle for the writing and/or publishing of Mr. Martin's articles in the Chronicle or any other publication, or from retaliating against Mr. Martin, the Chronicle, and Ms. Hoffman for having brought this suit;

4. requires the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them, to provide Mr. Martin with all of the writing materials of which he was deprived when he was transferred from the Lompoc penitentiary on June 30, 1988;

5. prohibits the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them from enforcing 28 C.F.R. § 540.20(b) against Mr. Martin and the Chronicle;

6. prohibits the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them from enforcing 28 C.F.R. § 540.20(b);

7. prohibits the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them from applying the conducting business regulation against Mr. Martin for his freelance writing;

8. requires the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation

with them, to expunge Mr. Martin's pending alleged prison infractions;

9. prohibits the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participating with them, from relying on any of Mr. Martin's purported prison infractions relating to his writing for the Chronicle or any other publication to adversely affect Mr. Martin's status before the Parole Board or to in any way detract from the Parole Board's stated intention to subtract time from Mr. Martin's target release date in view of his exemplary and rehabilitative writing in the Chronicle;

10. requires the defendants, their successors, officers, agents, employees, and all other persons acting in concert or participation with them, to return Mr. Martin to a federal prison in California other than Lompoc penitentiary in order to facilitate exercise of First Amendment rights violated by defendants' prior transfers of Mr. Martin.

C. Compensatory and punitive damages under the Bivens doctrine in an amount according to proof as is just and fair for defendants' constitutional torts, which were carried out knowingly and with malice and oppression;

D. Reasonable costs of suit and attorneys' fees incurred herein under the Equal Access To Justice Act or any other applicable federal or state constitutional, statutory or regulatory provision, or common-law doctrine;

E. A jury trial.

F. Such other and further relief as this Court deems just and appropriate.

DATED: August __, 1988

HELLER, EHRMAN, WHITE & MCAULIFFE
ACLU FOUNDATION OF SOUTHERN CALIFORNIA

Jeffrey A. Leon
Attorneys for Plaintiffs
Dannie Martin and Nancy Hoffman

COOPER, WHITE & COOPER

Neil L. Shapiro
Lisa A. Zinkan
Attorneys for Plaintiff
The Chronicle Publishing Co.

VI. Certificate of Parole

U.S. Department of Justice

United States Parole Commission
Chevy Chase, Maryland 20815

Certificate of Parole

Know all Men by these Presents:

It having been made to appear to the United States Parole Commission that MARTIN, DANNY MACK, Register No. 11319-086, a prisoner in the ECLECTIC COMMUNICATIONS, INC. is eligible to be PAROLED, and in that said prisoner substantially observed the rules of the institution, and in the opinion of the Commission said prisoner's release would not depreciate the seriousness of this offense or promote disrespect for the law, and would not jeopardize the public welfare, it is ORDERED by the said United States Parole Commission that said prisoner be PAROLED on FEBRUARY 19, 1992; and that said prisoner is to remain within the limits of NORTHERN/CALIFORNIA until SEPTEMBER 9, 2013;

Given under the hands and the seal of the United States Parole Commission this 21st day of FEBRUARY, 1992.

UNITED STATES PAROLE COMMISSION,

By [signed]
BERTHA COLE, CASE ANALYST
Initial Risk Category Poor (O)

Advisor _____

Probation Officer LOREN A. N. BUDDRESS, CUSPO, SAN FRANCISCO, CALIFORNIA

I have read, or had read to me, the conditions of release printed on the reverse of this certificate and received a copy thereof, I fully understand them and know that if I violate any, I may be recommitted. I also understand that the law requires the Parole Commission to revoke my parole if I am found by the Commission to have possessed any illegal controlled substance. I also understand that special conditions may be added or modifications of any condition may be made by the Parole Commission upon notice required by law.

[signed] Dannie M. Martin _____ 11319-086
(Name) Register number

WITNESSED [signed] James M. Schloetti [?]

U.S. Probation Officer _____ 3-23-92
(Title) (Date)

UNITED STATES PAROLE COMMISSION

The above-named person was released on the _____, day of _____, 19___ with a total of _____ days remaining to be served.

_____
(Chief Executive Officer)

CONDITIONS OF RELEASE

1. You shall go directly to the district shown on the CERTIFICATE OF RELEASE (unless released to the custody of other authorities). Within three days after your arrival, you shall report to your parole advisor if you have one, and the United States Probation Officer whose name appears on this Certificate. If in any emergency you are unable to get in touch with your parole advisor, or your probation officer or the United States Probation Office, you shall communicate with the United States Parole Commission, Department of Justice, Chevy Chase, Maryland 20815.

2. If you are released to the custody of other authorities, and after your release from physical custody of such authorities, you are unable to report to the United States Probation Officer to whom you are assigned within three days you shall report instead to the nearest United States Probation Officer.

3. You shall not leave the limits fixed by this CERTIFICATE OF RELEASE without written permission from your probation officer.

4. You shall notify your probation officer within 2 days of any change in your place of residence.

5. You shall make a complete and truthful written report (on a form provided for that purpose) to your probation officer between the first and third day of each month, and on the final day of parole. You shall also report to your probation officer at other times as your probation officer directs, providing complete and truthful information.

6. You shall not violate any law. Nor shall you associate with persons engaged in criminal activity. You shall get in touch within 2 days with your probation officer of the United States Probation Office if you are arrested or questioned by a law-enforcement officer.

7. You shall not enter into any agreement to act as an "informer" or special agent for any law-enforcement agency.

8. You shall work regularly unless excused by your probation officer, and support your legal dependents, if any, to the best of your ability. You shall report within 2 days to your probation officer any changes in employment.

9. You shall not drink alcoholic beverages to excess. You shall not purchase, possess, use or administer marijuana or narcotic or other habit-forming or dangerous drugs, unless prescribed or advised by a physician. You shall not frequent places where such drugs are illegally sold, dispensed, used or given away.

10. You shall not associate with persons who have a criminal record unless you have permission of your probation officer.

11. You shall not possess a firearm or other dangerous weapons.

12. You shall permit confiscation by your probation officer of any materials which your probation officer believes may constitute contraband in your possession and which your probation officer observes in plain view in your residence, place of business or occupation, vehicle(s) or on your person.

13. You shall make a diligent effort to satisfy any fine, restitution order, court costs or assessment, and/or court ordered child support or alimony payment that has been, or may be, imposed, and shall provide such financial information as may be requested, by your Probation Officer, relevant to the payment of the obligation. If unable to pay the obligation in one sum, will cooperate with your Probation Officer in establishing an installment payment schedule.

14. You shall submit to a drug test whenever ordered by your probation officer.

SPECIAL CONDITIONS: (Applicable only if indicated)

(✓) You shall participate as instructed by your probation officer in a program approved by the Parole Commission for treatment of narcotic addiction or drug dependency, which may include testing and examination to determine if you have reverted to the use of drugs.

( ) You shall participate in a community based program for the treatment of alcoholism as directed by your probation officer.

( ) You shall participate in an in-patient or an out-patient mental health program as directed by your probation officer.

( ) You shall reside in and participate in a program of the Community Corrections Center as instructed until discharge by the Center Director, but no later than 120 days from admission.

(✓) Other:

You shall abstain from the use of alcohol and/or other intoxicants both during and after completion of any treatment program.

This CERTIFICATE will become effective on the day of release shown on the reverse side. If the releasee fails to comply with any of the conditions listed above, the releasee may be summoned to a hearing or retaken on a warrant issued by a Commissioner of the U.S. Parole Commission and reimprisoned pending a hearing to determine if the release should be revoked.

Information concerning a releasee under the supervision of the U.S. Parole Commission may be disclosed to a person or persons who may be exposed to harm through contact with that particular releasee if such disclosure is deemed to be reasonably necessary to give notice that such danger exists. Information concerning releasees may be released to a law enforcement agency as required for the protection of the public or the enforcement of the conditions of the release.

VII. Declaration of Peter Y. Sussman in Opposition to Motion to Dismiss Appeal Due to Mootness

[The following was filed by Chronicle in the Court of Appeals on November 14, 1991 (cover page omitted).]

DECLARATION OF PETER Y. SUSSMAN

I, Peter Y. Sussman, declare:

1. I am employed by The Chronicle Publishing Company ("Chronicle"), a plaintiff and appellant in this case, as editor of the Sunday Punch section published weekly by the San Francisco Chronicle as part of its combined Sunday edition with the San Francisco Examiner.

2. I frequently publish in Sunday Punch the work of freelance writers. I am particularly interested in pieces that offer points of view different from those readers usually see. The pieces written by plaintiff and appellant Dannie Martin, who had spent most of his adult life in a world -- prisons -- that most people know little about, were especially valuable in this regard. The same may be true of pieces written by other convicts.

3. Although Dannie Martin is no longer in prison, I continue to regularly receive submissions from convicts. I am very much interested in publishing pieces by convicts; however, the regulations challenged by plaintiffs and appellants in this case, especially section 540.20(b) of Title 28 of the Code of Federal Regulations, make it difficult for me to determine how to handle these submissions. For example, it is not clear to me what I can publish without subjecting the author to punishment for violating the prohibition to "act as reporter." Moreover, I am aware that I must either depart from my usual practice of putting bylines on first-person commentary or subject the author to punishment for violating the prohibition to "publish under a byline."

4. The letter sent to Chronicle by the Director of the Bureau of Prisons on March 15, 1991, which is an exhibit to the Declaration of W. Ronald Ingram filed herewith, exacerbates my difficulty in dealing with convicts' submissions. Mr. Quinlan's letter appears to assert that I violate the regulations when I publish anything written by a convict, even without a byline and even if Chronicle does not pay the author. This gives me pause about publishing any of the submissions that I receive from convicts. I am especially concerned about passing any convict's submission on to my co-workers who work on the news section (which I have done in the past with Dannie Martin's work), since Mr. Quinlan asserts that publishing an inmate's writing in the news section of the Chronicle is a more clear violation than publishing it in Sunday Punch.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 11, 1991.

[signed]
Peter Y. Sussman

VIII. Declaration of W. Ronald Ingram in Opposition to Motion to Dismiss Appeal Due to Mootness

[The following was filed by Chronicle in the Court of Appeals on November 14, 1991 (cover page omitted).]

DECLARATION OF W. RONALD INGRAM

I, W. Ronald Ingram, declare:

1. I am an attorney licensed to practice in the State of California. I am employed by The Chronicle Publishing Company ("Chronicle"), a plaintiff and appellant in this case, as its general counsel.

2. On March 15, 1991, The Chronicle Publishing Company received a three-page facsimile transmission comprising a cover sheet and a two-page letter from defendant and appellee J. Michael Quinlan, Director of defendant and appellee Federal Bureau of Prisons, to Richard T. Thieriot, president of Chronicle and editor/publisher of the San Francisco Chronicle. A true and correct copy of the facsimile transmission received by Chronicle is attached hereto as Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 11, 1991.

[signed]
W. Ronald Ingram

[Exhibit A]

CENTRAL OFFICE

GENERAL COUNSEL
320 FIRST STREET, N.W., RM. 754
WASHINGTON, D.C. 20534
(202) 307-3062 COMMERCIAL
367-3062 FTS

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

TO: MR. RICHARD T. THIERIOT
FROM: HARLAN PENN
SUBJECT: _____

FAX # - 415/495-7198

REFERENCE: _____

NUMBER OF PAGES BEING SENT 3
INCLUDING COVER SHEET

FAX - COMMERCIAL (202) 307-2995
FAX - FTS 367-2995

THANK - YOU, HAVE A NICE DAY!

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

Office of the Director

Washington, DC 20534

Mr. Richard T. Thieriot
Editor
The Chronicle Publishing Co.
901 Mission Street
San Francisco, CA 94103

Re: Federal Inmate Dannie Martin

Dear Mr. Thieriot:

I was extremely disappointed to see the article on page A12 of your February 9, 1991 edition, titled "U.S. Inmate-Workers Go on Overtime for War," authored "by a federal prisoner" described as "a convicted bank robber and prisoner at the Federal Correctional Institution in Phoenix who has been a frequent contributor to Sunday Punch." It is clear that the article was written by Dannie Martin, whose writings for your paper were the subject of recent litigation. My concern stems from the fact that the article appeared in the news section of your paper, something which I believes violates the spirit, if not the letter, of the recent decision by District Judge Charles A. Legge.

Our ongoing concern, recognized in Judge Legge's opinion, is that your decision to continue publishing submissions identifiable as Dannie Martin's can potentially disrupt the orderly running of FCI Phoenix by elevating the status of Dannie Martin with the inmate population and undermining the staff's ability to maintain discipline in an evenhanded fashion. This concern is substantially heightened by the publication in your February 9, 1991 edition, of an article in the news section of your newspaper. These actions potentially create a danger to Dannie Martin if he is perceived by other inmates as a "Big Wheel" or as one wielding influence within the prison population.

While we remain very concerned about the publication of submissions by Dannie Martin in the Sunday Punch section and believe such publication violates the spirit of Judge Legges' decision, we believe publication in the news section is of greater concern in the light of Judge Legges' decision.

Given these concerns, I request you reconsider your decision to continue publication of submissions by Dannie Martin as a responsible constructive step toward assisting us in fulfilling our public responsibility to run safe, orderly institutions and to protect the individual safety of all inmates.

I write not with the intent that you publish this letter in your paper, and in fact ask that this letter remain a private communication.

Sincerely,
[SIGNED]
J. Michael Quinlan
Director

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-1061

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CHRONICLE PUBLISHING COMPANY, ET AL.,
PETITIONERS

v.

R.H. RISON, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether federal courts may adjudicate the merits of moot cases.

2. Whether petitioner Martin's release on parole moots the claims presented in this case for injunctive and declaratory relief against the enforcement of prison regulations.

3. Whether this case is not moot because damages were sought in the complaint or because petitioner The Chronicle Publishing Company, which had published articles by petitioner Martin while he was imprisoned, alleges a continuing interest in the possible future publication of work by other federal prisoners.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1061

THE CHRONICLE PUBLISHING COMPANY, ET AL.,
PETITIONERS

v.

R.H. RISON, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is reported at 962 F.2d 959. The opinion of the district court (Pet. App. 2-40) is reported at 741 F. Supp. 1406.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1992. A petition for rehearing was denied on September 21, 1992. Pet. App. 41-42. The petition for a writ of certiorari was filed on December 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1986 petitioner The Chronicle Publishing Company, publisher of the *San Francisco Chronicle*, published a bylined article submitted by petitioner Martin, at the time a federal prisoner serving consecutive 15 and 18-year sentences for actual and attempted armed bank robbery. The Chronicle mailed Martin a check in payment for the article. Officials at the United States Penitentiary in Lompoc, California, returned the check to the Chronicle, along with a notice of United States Bureau of Prisons (BOP) regulations barring such payments to inmates. Tr. 3-279 to 3-280.[1] Martin decided to violate the regulations by continuing to accept compensation for future articles (and by continuing to permit the Chronicle to publish the articles under his byline). To avoid confrontation with prison officials, payments for the articles were secretly funneled through Martin's attorney. Tr. 3-280, 7-1238. After the first article in 1986 (Tr. 3-280), the Chronicle began publishing articles and reports by Martin about every four to six weeks.

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[1] The regulation involved, 28 C.F.R. 540.20(b), provides that an inmate "may not receive compensation or anything of value for correspondence with the news media. The inmate may not act as a reporter or publish under a byline." Prison regulations do not restrict inmates from submitting articles or information to the Chronicle or other news media for publication. To the contrary, "special mail" procedures authorized by regulation allow inmates (including, at the time, Martin) to send materials to the news media in sealed envelopes, with no inspection by prison officials. See 28 C.F.R. 540.18(c). Moreover, the regulations do not prohibit the use of a pseudonymous byline.

On Sunday, June 19, 1988, the Chronicle published an article by Martin that criticized the prison's administration, "implied that [the warden's] actions had increased tension among prisoners and caused violence," and "contained express statements about murders, assaults, and possible violence or rioting." Pet. 3; Pet. App. 16. The warden, concerned about the security situation at the prison (particularly in the context of major riots that had recently occurred at two other federal prisons), followed the recommendation of his Chief of Security and placed Martin in administrative detention for two days while investigating whether Martin's safety was in jeopardy and whether Martin was attempting to encourage a group demonstration. Several days later, Martin was transferred to another federal prison because of BOP concerns that he would be a catalyst for a disturbance at Lompoc. Pet. App. 31-35.

During the warden's security investigation, prison officials found evidence of the continuing compensation Martin was receiving for his writing. A disciplinary incident report was filed against Martin for "conducting a business * * * while incarcerated."[2] No further action was taken with respect to the report after Martin's transfer. See Gov't C.A. Br. 8.

2. On July 6, 1988, shortly after Martin's transfer, petitioners filed this action in the district court, alleging that the BOP's regulations barring inmates from publishing under a byline, receiving compensation from the news media, or conducting a business

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[2] No inmate is permitted to conduct or engage actively in a business or profession while incarcerated. See 28 C.F.R. 540.14(d), 541.13 (Table 3), 540.45.

(as applied to newspaper writing) were unconstitutional on their face and as applied. Martin also sought damages from the respondent prison officials for their allegedly retaliatory actions in placing him in administrative detention and transferring him to another prison in June 1988. Pet. App. 7. At petitioners' request, the district court entered a temporary restraining order and later a preliminary injunction barring application of the challenged regulations to Martin—and thus permitting the continued publication of articles under his byline—while the litigation was pending. Pet. 5.

Trial commenced in December 1989, and 13 days of testimony were presented. On June 26, 1990, the district court dissolved the preliminary injunction and entered judgment for the respondents. Pet. App. 40. The court observed that the challenged regulations "do not control the content of what is said" and that "no attempt is made to edit, restrain or prevent written material from going out of the prison or from being published." *Id.* at 14. Thus, the regulations restricting bylines, compensation, and the conduct of business "are limited exceptions to the broad grants to prisoners of means for exercising their rights of expression."[3] *Id.* at 20. The court also

[3] 28 C.F.R. 540.20(b) also bars an inmate from "acting as a reporter." This provision, which bars an inmate from working on a regular basis to provide information to the news media for compensation, was never applied to Martin and is irrelevant here. See Tr. 11-74. Even petitioners' expert at trial agreed that such conduct would constitute a real security threat within the prison. Tr. 4-473. Petitioners have not claimed that Martin was a reporter, or that the Chronicle has any interest in hiring an inmate reporter.

recognized the potential dangers to physical security within the prison that were alleviated by the challenged regulations. *Id.* at 15-19. After extensive analysis, the court concluded that the regulations were "rationally related to the legitimate penological objective of prison security," that they gave fair notice to affected parties of the conduct they prohibited, and that they were applied rationally and in good faith on the facts of this case. *Id.* at 22, 24, 38-39. The court therefore found no constitutional infirmity in the regulations on their face or as applied to Martin's conduct. *Id.* at 38-39.

The district court also rejected Martin's contention that his placement in administrative detention and subsequent transfer was intended as retaliatory punishment. It found from the evidence that respondents "acted because of a genuine concern for prison security and for no other reason," Pet. App. 30, and thus denied Martin's claim for damages. See *id.* at 30-35, 38-39.

3. Petitioners appealed. In their briefs and at oral argument petitioners challenged the district court's rulings as to the constitutionality of the regulations, but did not contest the district court's findings rejecting Martin's theory of retaliation and his claim for damages.

In February 1992, Martin was released on parole. He therefore ceased to be subject to the BOP regulations at issue, which restrict the activities of federal inmates only while they are actually incarcerated. At the government's suggestion, and after full briefing by the parties, the court of appeals found that Martin's release had rendered the case

moot. Pet. App. 1. The court therefore vacated the district court's judgment and remanded the case to that court with instructions to dismiss it as moot. *Ibid.*

ARGUMENT

1. Petitioners first contend, Pet. 10-18, that federal courts have the power to decide the merits of moot cases in certain circumstances, and that the court of appeals should have done so in this case. They base their position largely on the fact that considerable resources have already been expended in the course of the litigation, and argue that "the likely precedential effect of a decision on appeal would justify the [further] expenditure of judicial resources necessary to adjudicate the merits." Pet. 13 (quoting Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 605, 656 (1992)).

This Court has made quite clear that "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988), and *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). This rule requires that the parties have a "personal stake in the outcome" of the lawsuit. *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983). Absent a class action or a dispute that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), the requirement of a live controversy between personally interested parties subsists through all stages of federal judicial proceedings, trial and appellate. *E.g.*, *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 477-478; *Los Angeles*

v. *Lyons*, 461 U.S. at 101-102, 109. Petitioners put forward the classic arguments for why one might devise a court system prepared, at least in complex or interesting cases, to offer advisory opinions. However intriguing, those arguments are irrelevant in the face of the contrary system adopted by the Constitution and repeatedly reaffirmed by this Court. See, *e.g.*, *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241 (1937); *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1993).

Even if dismissal were not constitutionally compelled, however, there are no particular circumstances in this case that might counsel a federal court to strain to reach the merits of the case. As the district court found, Pet. App. 14-15, 20, the specific regulations challenged here impose very limited restrictions on the broad privileges of federal inmates to communicate information and written materials to the news media. Inmates are allowed to submit articles and letters for publication without censorship by prison authorities and without restriction as to content. They are not prevented from providing factual material to the news media. In fact, inmates may communicate to the news media through "special mail" that is sealed by the inmate and not subject to inspection by prison authorities. 28 C.F.R. 540.18(c).

The challenged regulations bar only those activities that the BOP views as having the greatest potential for creating security problems within federal prisons, while leaving open as many forms of inmate communication as possible. Indeed, Martin continued to publish articles in the Chronicle even after the adverse judgment of the district court in

this case, subject only to the requirements that he cease using a byline and cease receiving compensation.[4] See Pet. App. 67-68.

Petitioners claim that dismissal is a "pointless waste of judicial resources," because the trial took several weeks and the case had already been briefed and argued in the court of appeals when it became moot. Pet. 16. That argument of course discounts the potential waste of resources of the court of appeals and of this Court in resolving a case which subsequent events have rendered moot. Moreover, while petitioners did challenge the facial constitutionality of several regulations, much of the trial evidence and many of the issues raised on appeal involved specific factual issues of no continuing importance, such as the details of the prison authorities' dealings with Martin and the constitutionality of the regulations as specifically applied to him.

2. Petitioners also contend that Martin's parole does not moot this case, relying on the fact that the terms of his parole might permit future reincarceration on a variety of grounds. Moreover, they assert a

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[4] The observation that the regulations are so limited in scope may account for the fact that the issue of their validity does not arise with any frequency. Indeed, petitioners asserted below that the regulations in issue had never been applied to any inmate other than Martin. Martin C.A. Br. 7, 10. While respondents disputed this specific contention, it is clear that occasion for application of the these regulations arises only rarely. Gov't C.A. Br. 44 & n.35. As the district court stated, "[t]he evidence disclosed perhaps two instances of prisoners who wrote under a byline for a newspaper, although it is questionable whether they had acted as a reporter or received compensation." Pet. App. 27.

conflict among the courts of appeals on this issue. Pet. 18-19. These arguments are without merit.

a. This case is not one whose particular facts disclose a serious issue that is "capable of repetition, yet evades review." *Los Angeles* v. *Lyons*, 461 U.S. at 109; *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). In the absence of a class action, that doctrine is limited to cases meeting each of two conditions: (i) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and (ii) there must be a reasonable expectation that the same complaining party will again be subjected to the same challenged action. *E.g.*, *Weinstein* v. *Bradford*, 423 U.S. at 149.

The first condition is clearly absent here. Terms of incarceration in federal prisons are not necessarily short, and if other prisoners in the future wish to assert the same claim presented here, there is no reason to believe that they will not have ample time to litigate it. See *Wiggins* v. *Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985) (Kennedy, J.); *Young* v. *Lane*, 922 F.2d 370, 373 n.7 (7th Cir. 1991); *Ross* v. *Reed*, 719 F.2d 689, 694 (4th Cir. 1983). Martin himself was incarcerated from 1981 until early 1992, which would ordinarily be ample time to resolve a claim such as the one presented in this case.[5]

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[5] It should be noted that Martin substantially delayed commencement of this litigation even after the challenged restrictions became an issue. Petitioners were specifically advised of the regulations at least as early as 1986, when Martin first wrote an article for the Chronicle. Rather than challenging the regulations at that time, however, Martin simply continued to violate them, secretly funneling payments for his articles through his attorney. Tr. 3-279 to 3-280, 3-398, 7-1238.

The same reasoning answers the Chronicle's argument, Pet. 9, 17, that it retains an independent interest in the case because the fact pattern is "capable of repetition" with respect to other (unidentified) inmate authors. In this regard, the Chronicle inexplicably relies on a letter from the BOP, sent after the judgment in the district court, expressing concern that the continuing publication of Martin's articles (without a byline but with details sufficient in context to identify the author) could cause a security problem in the prison to which Martin had been transferred. See Pet. App. 67-68. The letter refers only to the specific security problems arising with respect to Martin, and it gives no indication of any continuing dispute with the Chronicle that would extend beyond Martin's release on parole.

Nor is the possibility that Martin may violate the terms of his parole and be reincarcerated, so that he would again be subjected to the restrictions of the federal prison regulations, sufficient to prevent the case from being moot. The mere possibility of reincarceration or retransfer cannot preserve a claim for injunctive and declaratory relief regarding prison conditions as a live controversy after a prisoner is transferred or released on parole. See, *e.g.*, *Weinstein* v. *Bradford*, 423 U.S. at 149; *Preiser* v. *Newkirk*, *supra*; *Dorman* v. *Thornburgh*, 955 F.2d 57, 58 (D.C. Cir. 1992); *Johnson* v. *Moore*, 948 F.2d 517, 519 (9th Cir. 1991). With respect to equitable relief, such

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It was not until two years later, after prison officials discovered financial records showing the continuing payments, that petitioners chose to challenge the regulations in court.

a live controversy requires a continuing, present injury, or a real and immediate threat of repeated injury. *E.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). The possibility of return to prison for a new violation is "too speculative * * *, and as such cannot be the basis for a finding that the case continues to present a justiciable question." *Wiggins* v. *Rushen*, 760 F.2d at 1011. See *O'Shea*, 414 U.S. at 496-497; *Cox* v. *McCarthy*, 829 F.2d 800, 804 & n.3 (9th Cir. 1987); *Darring* v. *Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986); *Ross* v. *Reed*, *supra*. Given the lack of any evidence indicating an unusual likelihood of reincarceration, the court of appeals properly found the case to be moot.

b. Contrary to petitioners' assertion, Pet. 18-19, the decision below does not conflict with those of other courts of appeals.[6]

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[6] Although any intra-circuit conflict would of course not require the intervention of this Court, petitioners' suggestion, Pet. 19 n.20, that the decision below departs from Ninth Circuit precedent is also without merit. See *Johnson* v. *Moore*, 948 F.2d at 519 (where transferred prisoner "demonstrated no reasonable expectation of returning," claims for injunctive relief were moot); *Wiggins* v. *Rushen*, *supra* (inmate's complaint for an injunction became moot upon transfer and parole, even where new charges had already been filed against him). In *Workman* v. *Mitchell*, 502 F.2d 1201 (9th Cir. 1974), the suit was not mooted by the release of the named inmate plaintiffs because, unlike this case, *Workman* was a class action. See *Sosna* v. *Iowa*, 419 U.S. 393 (1975). The *Workman* court's passing reference (502 F.2d at 1207 n.7) to the Seventh Circuit's decision in *Morales* v. *Schmidt*, 489 F.2d 1335 (1973), aff'd on rehearing en banc, 494 F.2d 85 (1974), is simply erroneous dictum that does not establish even an intracircuit conflict. While the similarly brief reference to the issue in

The Seventh Circuit follows the general rule set forth above. See, *e.g.*, *Young* v. *Lane*, 922 F.2d 370, 373 & n.7 (1991) (transfer of prisoners mooted claims for injunctive relief). Petitioners cite that court's decision in *Morales* v. *Schmidt*, 489 F.2d 1335 (1973), aff'd on rehearing en banc, 494 F.2d 85 (7th Cir. 1974). *Morales*, however, involved mailing restrictions that had a continuing effect on the former prisoner even while he was on parole. The court made clear that prison officials would "have legal custody of the plaintiff, although a parolee, for six more years and [have] authority to impose restrictions upon him," and that the official in question had in fact "stated that he has refrained from preventing Morales from communicating with his sister-in-law solely because of the duty to comply with the district court's injunction." 489 F.2d at 1336. *Morales* thus stands only for the unremarkable proposition that parole of a prisoner will not moot a challenge to governmental regulations that continue to restrict his activities.[7]

Petitioners also cite *Chapman* v. *Pickett*, 586 F.2d 22 (7th Cir. 1978). *Chapman* held that a portion of a paroled prisoner's declaratory claim was not moot because of the possibility that records of disciplinary

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Diamontiney v. *Borg*, 918 F.2d 793, 795 n.1 (9th Cir. 1990), is somewhat unclear, that case was held not to be moot apparently because, as discussed in the text with respect to *Morales*, the challenged mail policies could "still have an impact on [the former prisoner's] correspondence with the courts."

[7] The *Morales* court did note the possibility that the parolee might be returned to prison after a future infraction. It did not, however, indicate that that possibility by itself would suffice to prevent the case from being moot.

action taken against him would be used against him in the future. *Id.* at 26-27. Because Martin was never disciplined for his violation of the byline and compensation regulations, there can be no such claim of a continuing adverse effect in this case. Thus, regardless of its merits, *Chapman*'s holding is not applicable here.

The Tenth Circuit's decision in *McKinney* v. *Maynard*, 952 F.2d 350 (1991), is also consistent with the decision below. Unlike petitioner Martin, McKinney had not been released on parole at the time of the court of appeals' decision; rather, he had been transferred to another facility and placed on "pre-parole" status for a number of months. It appears from the court's brief discussion of the point, which is based largely on a citation to *Morales*, that in that status McKinney, like Morales but unlike Martin, remained subject to the terms of the challenged regulations. *Id.* at 351 n.1.

3. Petitioners also contend, Pet. 20-22, that there is a continuing controversy regarding damages in this case. An inmate's claim for damages for past illegal conduct is not, of course, mooted by his release or transfer. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). In this case, however, Martin's claim for damages was resolved adversely to him in the district court and the court's findings on the damages issue were not challenged on appeal.

In the district court, Martin's damages claim was founded upon the allegation that his placement in administrative detention and his transfer to another prison denied him due process, and that the actions were intended as punishment to retaliate against him

for the content of his writing. The district court specifically rejected those contentions, finding that the "defendants acted because of a genuine concern for prison security and for no other reason." Pet. App. 30. See Pet. App. 30-35, 38-39. Petitioners' appeal to the Ninth Circuit did not challenge these findings, but raised only issues related to the claims for injunctive and declaratory relief. Because the trial court's factual findings dictate rejection of the damages claim and were not challenged on appeal, there is no continuing controversy as to the award of damages.

Now that mootness has become an issue in the case, petitioners have suggested that the damages claim was not limited to the alleged retaliation. Pet. 20. While there is arguably broader language included in the complaint, petitioners' pretrial statement clearly identifies the alleged retaliation as the basis of the damages action:

> The damages phase concerns whether Defendants retaliated against Plaintiffs' First Amendment activities and, if so, what damages should be awarded.
>
> * * * * *
>
> [In the damages phase] [i]t probably would be left for the jury to determine whether Defendants had retaliated against Plaintiffs' expression of their First Amendment rights * * *.

Pretrial Statement 9-10.

Moreover, under the facts of this case, no viable damages claim could have been advanced except under

the retaliation theory. This case is not the typical one in which damages are sought based on the past application of regulations to a prisoner. Through June 1988, the Chronicle and Martin chose to ignore and evade the regulations. Shortly thereafter, petitioners filed this suit and promptly obtained a temporary restraining order and subsequent preliminary injunction barring application of the regulations to Martin while the case was pending. Accordingly, prior to final judgment in the district court, Martin continued to receive compensation and have articles published under his byline unimpeded by the challenged regulations. Because the regulations were not in fact applied to him, he could not have suffered any injury from their application.

Petitioners' claim is further foreclosed by the qualified immunity of the respondent BOP employees. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). For the reasons expressed in the district court's factual findings and opinion upholding the constitutionality of the challenged regulations, and given the lack of any contrary authority, it is evident that the respondent BOP employees' conduct in applying the BOP regulations in a non-retaliatory manner did not violate any clearly established constitutional rights of which a reasonable person would have been aware. Accordingly, any damages claim predicated on such good-faith enforcement of the regulations is not viable. Petitioners fault the court below for not addressing, or remanding for further proceedings on, the qualified immunity issue. Pet. 20-21. As discussed above, however, petitioners' damages claim had been resolved in the district court on other sufficient

grounds and, in any event, there is no serious argument on the qualified immunity question that would have warranted discussion or remand by the court below.

4. Finally, petitioners contend, Pet. 17, 22 n.22, that regardless of Martin's continuing interest in the case, the Chronicle's independent interest prevents the case from becoming moot upon Martin's release. Given Martin's release, however, the Chronicle has demonstrated no present or continuing injury, nor any "real" or "immediate" threat of repeated injury from application of the allegedly unconstitutional regulations. See *Los Angeles* v. *Lyons*, 461 U.S. at 101-102; *O'Shea* v. *Littleton*, *supra*. Absent its ongoing business relationship with Martin or another actual inmate writer, the Chronicle cannot continue to prosecute the suit. See *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975); *Darring* v. *Kincheloe*, 783 F.2d at 877.

The Chronicle's vague assertions that it "maintains an interest in reporting about prisons," Pet. 17, or is "very much interested in publishing pieces by convicts," Pet. App. 63, do not identify the sort of "specific live grievance" required to preserve federal jurisdiction, *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 479 (quoting *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969)), but rather enter "the area of speculation and conjecture." *O'Shea* v. *Littleton*, 414 U.S. at 497. The Chronicle has not named any particular federal inmate who has submitted an article it would publish but for the regulations; it has not stated that there is any actual federal inmate author it wishes to compensate but cannot; and it has not averred that

there is any federal inmate author making submissions for whom a byline under a pseudonym would be insufficient. On the record of this case, there is no substantial controversy of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden* v. *Zwickler*, 394 U.S. at 108.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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